Supreme Court, U.S.
FILED

051110 FEB 7 - 2006

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No.

In the Supreme Court of the United States

RADA BIDOAE,

Petitioner

v.

HARTFORD GOLF CLUB ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented here are:

Whether the Connecticut Appellate Court violated the United States Constitution when it ruled contrary to statute that the Connecticut Workers Compensation Commission using its equitable powers has the power to order a vocational examination with a non physician and sanction the claimant for refusal to comply.

Whether the determination of disability by an Administrative Law Judge granting Social Security Benefits has collateral estoppel or persuasive affect on proceedings in a state Workers Compensation claim when the work injury was the substantial factor in causing the disability.

PARTIES TO THE PROCEEDING

The Caption of the Case Contained on the cover sheet to this Petition contains the name of all parties to the proceedings in this court. There are no parent companies or non-wholly owned subsidiaries of the Petitioner, Rada Bidoae.

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PETITION FOR WRIT OF CERTIORARI

Attorney Neil Johnson respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Appellate Court of the State of Connecticut Entered in this proceeding on September 20, 2005 which the Supreme Court of Connecticut denied review on November 9, 2005, in order to resolve the conflict between the Connecticut Courts and the United States Constitution on the important issue presented herein.

OPINIONS BELOW

The order of the Connecticut Supreme Court (Appendix A1) is reported at 276 Conn. 921; 888 A.2d 87 (2005). The opinion of the Connecticut Appellate Court (Appendix A2) is reported at 91 Conn. App. 470; 881 A.2d 418 (2005). The opinion of the Connecticut Compensation Review Board (Appendix A18) is unreported. The opinion of the Connecticut Workers Compensation Commission (Appendix A25) is unreported. Finding and Order of the Connecticut Workers Compensation Commission RE: Vocational Examination (Appendix A31) is unreported.

JURISDICTION

On September 20, 2005, the Appellate Court issued its decision holding that a Workers Compensation Claimant is required to undergo an examination by a non-physician. On November 9, 2005 the Connecticut Supreme Court denied the Petitioners Petition for Review making the Appellate Court the Highest Court in the State in which a decision may be had and the Petitioner's only course of action is to appeal to the United States Supreme Court. *U.S. ex. Rel. Corrono v. Richmond* 177 F. Supp. 504 (1959). Pursuant to Supreme

Court Rule 13.1, this petition has been filed within 90 days of the entry of the Connecticut Supreme Courts denial of review.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257.

STATUTES INVOLVED IN THIS CASE

Title 28 of the United States Code, Section 1257(a) provides in part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validly of a treaty or statute of the United States is drawn in question or where the validity of a statue of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of , or any commission held or authority exercised under the United States."

The United States Constitution provides in part:

Article I, Section 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 8: "The Congress shall have Power. . .[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all

other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S.C.A Const. Amend. XIV § states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Connecticut General Statutes Section 31-294f(a) (CGSA § 31-294f) provides in relevant part:

"An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request fo the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers Compensation Commission and shall be paid by the employer. ."

Connecticut General Statutes Section 31-275 (CGSA § 31-275) in relevant part defines a Physician to include:

> "any person licensed and authorized to practice a healing art, as defined in Section 20-1 and licenses under the provisions of chapters 370, 372, and 373 to practice in this state."

Connecticut General Statutes Section 20-1 (CGSA § 20-1) in relevant part defines healing arts and states:

> "the practice of the healing arts means the practice of medicine, chiropractic, podiatry, natureopath and, except as used in chapters 284a and 388, the practice of optometry."

Connecticut General Statutes Section 31-278 (CGSA §31-278) in relevant part states:

The Commissioner "shall. . .have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all power necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. . ."

Connecticut General Statutes Section 31-298 (CGSA 31-298) in relevant part states that:

> "The commissioner shall proceed, so far as possible in accordance with the rules of equity. He shall not be

> bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. . ."

Social Security Act §223(d)(2)(A) provides in part that:

> "an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For the purposes of the preceding sentence (with respect to any individual), work which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Connecticut General Statutes Section 31-276 (CGSA 31-276) is set out at Appendix A51.

Connecticut General Statutes Section 31-307 (CGSA 31-307) is set out at Appendix A48.

STATEMENT OF THE CASE

The Petitioner filed a Workers Compensation Claim and thereafter moved for permanent total disability benefits under Connecticut General Statutes Section 31-307. In support of the Petitioners position for total disability benefits she disclosed a rehabilitation specialist expert. The Workers Compensation Commission ordered the Petitioner to undergo an Independent Medical Examination of the Petitioner. The petitioner did not object to the examination but objected when the Commissioner ordered the Petitioner to undergo an examination by a non-physician which is in violation of statute. The Commissioner sanctioned the Petitioner for not submitting to an examination by a non-physician by refusing to allow the Petitioner to submit evidence from her rehabilitation specialist. After trial on the issue of permanent total disability benefits the Petitioner appealed to the Compensation Review Board citing that the rulings of the Workers Compensation Commission were in direct conflict with statute and a violation of the Petitioners Constitutional rights. The Compensation Review Board and thereafter the Appellate Court upheld this decision reasoning that a Workers Compensation Commissioner has the power and duty to act in equity and not within statutory confines and that the petitioners due process rights were not violated. (Connecticut Compensation Review Boards opinion and ruling is in the Appendix at A18; The Connecticut Appellate Courts ruling is in the Appendix at A2)

Petitioner filed this writ of certiorari to appeal the final judgment of the Connecticut Appellate Court which is repugnant to the United States Constitution.

REASONS FOR GRANTING THE WRIT

It is the responsibility of the United States Supreme Court to review the final judgments rendered by the highest court of the state when the judgment is repugnant to the Constitution or the laws of the United States. In the case at bar, the decision rendered by the Connecticut Appellate Court, the highest court in the state in which a decision may be had, is violative of the United States Constitution, Article I.

I. THE DECISION OF THE CONNECTICUT APPELLATE COURT IS ERRONEOUS AND VIOLATES FEDERAL CONSTITUTIONAL LAW

In the case at bar, the Connecticut Appellate Court held that a Workers Compensation Commissioner can order a claimant to undergo an examination, physical or mental, by a non-physician in exercise of his equitable powers and that these equitable powers usurp the statutes enacted by the legislature governing these examinations. The Connecticut Appellate Court further held that the due process of the Untied States Constitution and the Connecticut Constitution does not include a right to privacy in relation with examinations of parties to a litigation and that if it did exist that the Workers Compensation Commissions equitable powers usurp this Constitutional Right.

The Constitution of the United States creates three (3) separate branches of government each with "limited and defined powers." *Citizen's Sav. & Loan Association of Cleveland vs. City of Topeka*, 87 U.S. 655, 663, 20 Wall. 655, 22 L.Ed. 455 (1874). These "limitations. . .grow out of the essential nature of all free governments. . .without which the social compact could not exist, and which are respected by all governments . . .without which the social compact

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could not exist, and which are respected by all governments entitled to the name." *Id.* This theory applies to both our state and national governments. *Id.* State courts, therefore, have an affirmative duty to apply federal constitutional law to their interpretations and decisions, even if the subject matter of those decisions is strictly state law. *Hartfield vs. East Grand Rapids Public Schools,* 960 F.Supp. 1259 (W.D. Mich. 1997). State courts are bound to preserve the separation of powers of our government systems.

In Connecticut the Legislature created and established the Workers Compensation Commission to administer the Workers Compensation system. *Connecticut General Statutes 31-276.* "[T]he workers' compensation commission, like any administrative body, must act strictly within its statutory authority" *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d. 396 (1998); citing *Discuillo v. Stone & Webster,* 242 Conn. 570, 698 A.2d. 873 (1997); *Figueroa v. C&S Ball Bearing,* 237 Conn. 1, 4, 675 A.2d 845 (1996); *Castro v. Viera,* 207 Conn. 420, 428, 541 A.2d 1216 (1998). "Although the Worker's Compensation Act should be broadly construed to accomplish its humanitarian purpose its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries." *id. Citing: Adzima v. UAC/Norden Division,* 177 Conn. 107, 117, 411 A.2d 924 (1997); *Perille v. Raybestos-Manhattan-Europe, Inc.,* 196 Conn. 529, 541, 494 A.2d 555 (1985); *Kinney v. State,* 213 Conn. 54, 566 A.2d 670 (1989); *Castro v. Viera,* supra, at 426,. The "workers compensation commission cannot modify, abridge, or otherwise change statutory provisions under which it acquires authority unless statutes expressly grant it that power." *Dowling supra.* " Compensation commissioner is administrator empowered to enforce statutes concerning workmen's compensation." *Chieppo v. Robert E. McMichael, Inc.* 169 Conn. 646, 363 A.2d 1085 (1975).

A THE APPELLATE COURT VIOLATED THE SEPARATION OF POWERS CLAUSE IN UPHOLDING AN ORDER TO ALLOW FOR MEDICAL EXAMINATIONS BY NON-PHYSICIANS

The Independent Medical Examination Statute within the Workers Compensation Act, Connecticut General Statutes §31-294f, states:

> "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request fo the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers Compensation Commission and shall be paid by the employer. .

Connecticut General Statutes § 31-275 in the Workers Compensation act defines a Physician to include "any person licensed and authorized to practice a healing art, as defined in Section 20-1 and licenses under the provisions of chapters 370, 372, and 373 to practice in this state."

Connecticut General Statutes § 20-1 defines healing arts and states "the practice of the healing arts means the practice of medicine, chiropractic, podiatry, naturopath and, except as used in chapters 284a and 388, the practice of optometry."

The Appellate Court, while specifically recognizing the legislatures statutory directive concerning Independent Medical Examinations, has ruled that the Independent Medical Examination statute does not limit the equitable powers of the Workers Compensation Commission to order a claimant to undergo this type of examination with a non-physician. In support of its conclusion the Appellate Court has relied on two statutes, Connecticut General Statutes §31-278 and §31-298.

Connecticut General Statutes §31-278 was enacted by the legislature for the purpose of affording the Workers Compensation Commission the power to conduct hearings and states in relevant part that the Commissioner shall;

> "have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same power in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter..."

Connecticut General Statutes 31-278 "deals with the manner in which testimony is obtained and hearings are conducted." *Stickney v. Sunlight Const., Inc.* 730 A.2d 630, 248 Conn. 754 (1999).

Connecticut General Statutes §31-298, the

Connecticut Legislatures grant of power to lax the traditional rules of evidence, states, in relevant part;

> "the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter..."

The legislatures intention in enacting Connecticut General Statutes Section 31-278 and 31-298 was to give the Workers Compensation Commission the power to act equitably with regards to the rules of evidence and procedure along with acting equitably in conducting hearings. The Legislature dictates that the Workers Compensation Commission while exercising those equitable powers as specifically defined shall do so within the confines of the provisions of the Workers Compensation Act and intent of the legislature in enacting those provisions. The Workers Compensation Commissions grant of equitable powers is not a cart blange right to surpass the express dictates of the Workers Compensation Act but is limited by statute. Connecticut General Statutes Section 31-294f limits the Workers Compensation Commissions powers of equity by clearly and unambiguously limiting physical and/or mental examinations to qualified physicians and/or surgeons along with other dictates, none of which include the power to seek

out equity in applying the medical examination statute which the Appellate Court so clearly reasoned.[1]

The Workers Compensation Commission is "not permitted to seek out what [they] conceive to be the equities of each particular case and ignore specific provisions of the statute law which clearly control them." *Farmer v. Bieber-Goodman Corp.*, 118 Conn. 299, 172 A. 95 (1934) quoting *Blodgett v. New Britain Trust Co.*, 108 Conn. 715, 719, 145 A.56, 58 (1929) *internal quotations omitted.* "Where the language of a statute is unambiguous, the judiciary is powerless to intervene even to remedy a mistake. To attempt to do so would be a palpable exercise of legislative functions." *Id.* quoting *McKay v. Fair Haven & W.R. Co.*, 75 Conn. 608, 611, 54 A. 923, 924 (1903) *internal quotations omitted.*

The order compelling a claimant to undergo a physical examination by a non-physician is in direct conflict with the statutes. It is also allowing the Workers Compensation Commission to act outside of the statutory guidelines, perform duties outside of the Workers Compensation Act, transcend statutes including transcending specifically delineated powers instead of enforcing them, allowing to take plain and unambiguous language and define as something different, and extends the Workers

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1. Rule 35(a) of the Federal Rules of Civil Procedure which was amended in 1991 to allow for courts to seek out equities in determination of allowing examinations by other qualified non-physicians. The Connecticut Legislature has not Amended its statutes to mirror or allow for these types of examinations nor did the Appellate Court in the case at bar rely on Rule 35(a) in making its ruling.

Compensations equitable powers in a way that is unintended and unlimited. [2]

The Appellate Court by upholding this ruling surpassed its power to review, acted outside of its powers to review and interpret law, delved into the powers and stepped into the shoes of legislative branch. The Appellate Court modified and changed the Statute and legislatures directive to include examinations by a non-physician whether requested by the employer or ordered by the commissioner.

B. THE APPELLATE COURT VIOLATED THE SEPARATION OF POWERS CLAUSE IN UPHOLDING AN ORDER TO ALLOW FOR THE SANCTION OF EXCLUDING WITNESSES

The Workers Compensation Commission ordered the petitioner to undergo a physical/mental examination by a non-physician in direct violation of the legislatures dictates contained in Connecticut General Statutes 31-294f. The petitioner objected to being subjected to an examination by a non-physician and the Workers Compensation Commission sanctioned the petitioner by not allowing her to produce witnesses at a hearing.

The Appellate Court held that Connecticut Practice Book §13-14 authorizes the Workers Compensation

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2. In contradiction of *Dowling v. Slotnick* supra. (1998), *Discuillo v. Stone & Webster*, supra. , *Figueroa v. C&S Ball Bearing*, supra., *Castro v. Viera*, supra., *Adzima v. UAC/Norden Division*, supra, *Perille v. Raybestos-Manhattan-Europe, Inc.* Supra., *Kinney v. State*, supra, *Chieppo v. Robert E. McMichael, Inc.*, 169 Conn. 646, 363 A.2d 1085 (1975), *State v. States Employees' Review Board*, 239 Conn. 368, 687 A.2d 134 (1997), *State v. White*, 204 Conn. 410, 528 A.2d 811 (1987) and *City of New Haven v. Whitney*, 36 Conn. 373, 1870 WL 1048 (1870).

Commission to impose sanctions against a claimant who objects/refuses to undergo an examination by a non-physician and that said imposition of sanctions is within the sole discretion of the Workers Compensation Commission. The Appellate Court further ruled that Connecticut General Statutes §31-298 also allows the Workers Compensation Commission broad discretion in imposing sanctions due to the statutes direction in protecting the substantial rights of the parties in carrying out the provisions of the Workers Compensation Statutes.

According to Connecticut General Statutes §31-294f "refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

Practice Book §13-11 subsection (b) states that;
"any such request shall be complied with by the plaintiff, unless, within ten days from filing of the request, the plaintiff files in writing an objection thereto specifying to which portions of said request objection is made and the reasons for said objection. The objection shall be placed on the short calendar list upon the filing thereof. The judicial authority may make such order as is just in connection with the request. No plaintiff shall be compelled to undergo a physical examination by any physician to whom he or she objects in writing."

Connecticut General Statutes §31-294f explicitly sets out a sanction for refusing to undergo a "reasonable" examination which is to suspend the right to compensation.

Denying the claimant the right to submit evidence is clearly not indicated in Connecticut General Statutes 31-294f. While Connecticut General Statutes §31-298 states'

that a Commissioner "shall not be bound by the ordinary common law or statutory rules of evidence or procedure" the Commissioners ruling was not an evidentiary or a procedural ruling but clearly a sanction.

The Appellate Court cannot use the Legislatures grant of power to conduct hearings to impose a sanction on the petitioners objection to the order to undergo an examination by a non-physician. The grant of equitable powers by the Legislature to the Workers Compensation Commission is limited by statute. The Legislatures clear and unambiguous language dictates a specific sanction for refusing to undergo a reasonable examination and does not provide for exception.

The use of Connecticut General Statutes Section 31-298 to circumvent the directive of the Legislature as contained in Connecticut General Statutes Section 31-294f is in err.

The Workers Compensation Commission is "not permitted to seek out what [they] conceive to be the equities of each particular case and ignore specific provisions of the statute law which clearly control them." *Farmer v. Bieber-Goodman Corp.*, 118 Conn. 299, 172 A. 95 (1934) quoting *Blodgett v. New Britain Trust Co.*, 108 Conn. 715, 719, 145 A.56, 58 (1929) *internal quotations omitted.* "Where the language of a statute is unambiguous, the judiciary is powerless to intervene even to remedy a mistake. To attempt to do so would be a palpable exercise of legislative functions." *Id.* quoting *McKay v. Fair Haven & W.R. Co.*, 75 Conn. 608, 611, 54 A. 923, 924 (1903) *internal quotations omitted.*

The Appellate Court by upholding this ruling surpassed its power to review, acted outside of its powers to review and interpret law, delved into the powers and stepped into the

shoes of legislative branch. The Appellate Court modified and changed the Statute and legislatures directive for specific sanctions and created its own.

C. THE APPELLATE COURT VIOLATED THE PETITIONERS CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT

The Appellate Court legislated from the bench in ruling that a medical examination, physical or mental, can be ordered by the Workers Compensation Commission in direct violation of Statute. By the Appellate Court failing to implement and follow the statutory guidelines for this type of examination, applying sanctions outside of the legislative directive, punishing the Petitioner for objecting to a physical/mental examination by a non-physician as defined by statue and denying the petitioner the right to a fair hearing violated the Petitioners Due Process Rights.

The vocational rehabilitation specialist who the Commissioner ordered the claimant to submit to for an examination was a non-physician. The claimant reasonably objected to this examination but the Workers Compensation Commission compelled the claimant to subject herself to this examination anyways and sanctioned the Petitioner by not allowing witnesses to testify. Our Supreme Court has consistently stated that "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." U.S.C.A. Const.Amend. 14. The Legislature in Connecticut General Statutes Section31-294f has unambiguously stated that one may be sanctioned by refusing to undergo a reasonable examination. The Workers Compensation Commissioners order for the Petitioner to undergo an examination by a non-physician when the Legislature has clearly determined that these types

of examinations were to be performed by a licenced physicians and/or surgeons was unreasonable. The Petitioner had every right to object and refuse to undergo the examination ordered and the Workers Compensation Commission by sanctioning the Petitioner was a violation of the Petitioners Due Process rights.

Further, the Workers Compensation Commission went outside of the directive statute governing these types of examinations and relied on their grant of equitable powers to order an examination by a non-physician and propound a sanction different then the one the Legislature directed the Workers Compensation Commission to propound upon refusal. The Workers Compensation Commissions equitable powers in conducting hearings, rules of evidence and procedures cannot abridge the Petitioners Constitutional right to procedural and substantive due process. The Workers Compensation Commissions right to use their equitable powers cannot be limitless leaving them with no standards as to what is prohibited and what is not on a case by case basis or with the power to abridge the statutes that they are required to enforce.

The decision of the Workers Compensation Commission to sanction the Petitioner as it did deprived the Petitioners right to a fair hearing for permanent disability benefits. The employer in the matter at hand had every legal right to request and have ordered an examination by a qualified physician/surgeon to contest the Petitioners evidence but chose not to do so. Additionally, the Workers Compensation Commission in applying its equitable powers to hear evidence and facts could have requested or required a show of proof that there were no vocational rehabilitation specialist which qualified under statute, made a factual and/or evidentiary ruling as to the qualification and/or the

credibility and/or persuasiveness of both the Petitioners witnesses and the employers witnesses had an examination been ordered in accordance and within the confines of statute and weigh the evidence. Instead, the Workers Compensation Commission barred the Petitioner from presenting evidence when she refused to undergo an examination by a non-physician as she had every right to do denying her right to due process and equal protection under the law.

II. THERE IS A CONFLICT OF LAWS BETWEEN SOCIAL SECURITY'S DETERMINATION OF DISABILITY AND THE WORKERS COMPENSATIONS DETERMINATIONS OF DISABILITY

The Petitioner is requesting that this court review and take into consideration the issue of the impact of Social Security disability determinations on Workers Compensation disability determinations. In specific, the issue arises when a worker becomes temporality and/or permanently unemployed due to an injury which was work related. Said employee applies for Social Security disability benefits due to that injury which was work related and is determined to be totally disabled. The employee also moves for Workers Compensation benefits and despite the Social Security determination of disability the Workers Compensation Commission determines that worker to not be totally disabled based upon the same injuries, evidence and inability to work.

In the case at bar the Petitioner brought this issue before the Connecticut Appellate Court. The Petitioner argued that the issue of disability arising from the same injury should hold collateral estoppel effect when the Social

Security Administration determines permanent disability for that injury.

The Appellate Court held in the case at bar that the standards of the Social Security Administration in determining disability are not the same standards in determination of disability in the Worker Compensation Commission. The Appellate Court further held that to successfully assert the doctrine of issue preclusion the issue must have been litigated and determined between the parties or their privies and that that determination was essential to the decision in the prior case.

Connecticut has determined that one is "estopped by the doctrine of collateral estoppel from relitigating in the civil action the precise issue determined by a higher standard of proof" in the prior action. *Griffin v. Parker*, 22 Conn. App. 610, 579 A.2d 532 (1990), certification granted by *Griffin v. Parker*, 216 Conn. 825, 582 A.2d 203 (1990) and declined to address the issue in *Griffin v. Parker* 219 Conn. 363, 593 A.2d 124 (1991).

In the matter at bar the Standards of the Social Security Act requires a higher standard of proof to determine total disability then the standards set forth with in the Workers Compensation Commission Act. §223(d)(2)(A) of the Social Security Act states;

> "an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in

> which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For the purposes of the preceding sentence (with respect to any individual), work which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Connecticut General Statutes §31-307 governing total disability, in part, states that "The following injuries of any person shall be considered as causing total incapacity and compensation shall be paid accordingly: (1) Total and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision; (2) the loss of both feet at or above the ankle; (3) the loss of both hands at or above the wrist; (4) the loss of one foot at or above the ankle and one hand at or above the wrist; (5) any injury resulting in permanent and complete paralysis of the legs or arms or of one leg and one arm; (6) any injury resulting in incurable imbecility or mental illness."

"Incapacity, as that term is used under the Workers' Compensation Act, means incapacity to work, as distinguished from the loss or loss of use of a member of the body." "Total incapacity is defined as "the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow." *Rayhall v. Akim Co. Inc.*, 263 Conn. 328, 819 A.2d 803 (2003). "The test is not the employee's ability or disability because of his injury to do his old job but whether he could do another job and earn as much money." *Clark v. Henry & Wright Mfg. Co.* 136 Conn. 514, 72 A.2d 489 (1950). "A claimant may have some type of light duty

capacity and still be totally disabled under §31-307." *Agosto v. City of Bridgeport* 3967 CRB-04-99-01 2000.

The Connecticut Supreme Court in *Griffin v. Parker*, 22 Conn. App. 610, 579 A.2d 532 (1990), certification granted by *Griffin v. Parker*, 216 Conn. 825, 582 A.2d 203 (1990) and declined to address the issue in *Griffin v. Parker* 219 Conn. 363, 593 A.2d 124 (1991) has also abandoned privity in favor of fairness.

Lastly, according to the Appellate Court "an issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination and in fact determined." The claimant filed for Social Security Benefits for her disability that was caused by the injury sustained at work. The Social Security Administration determined and ruled that she was totally disabled. The issue before the Workers Compensation Commission was the same exact issue, i.e. was the Petitioner Totally Disabled.

CONCLUSION

For the foregoing reasons as set forth in this Petition For A Writ Of Certiorari, the Petitioner respectfully requests that her Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

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Neil Johnson, Esq.
Counsel of Record
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276 Conn. 921, 888 A3d 87

Supreme Court of Connecticut
Rada Bidoae
V.
Hartford Golf Club et al.
Decided November 9, 2005.

Neil Johnson, Hartford, in support of the petition.
Dominick C. Statile, Glastonbury, in opposition.
The plaintiff's petition for certification for appeal from the Appellate Court, *91 Conn.App. 470, 881 A.2d 418 (2005)*, is denied.

Borden and Zarella, Js., did not participate in the consideration or decision of this petition.

Conn. 2005,
Bidoae v. Hartford Golf Club
276 Conn. 921, 888 A.2d 87

RADA BIDOAE *v.* HARTFORD GOLF CLUB ET AL.
(AC 25603)

Lavery, C.J., and DiPentima and Gruendel, Js.
Argued June 2–officially released September 20, 2005

(Appeal from the workers' compensation review board.)

Neil Johnson, for the appellant (plaintiff).

Joseph J. Passaretti, Jr. With whom was *Dominick C. Statile*, for the appellees (defendants).

Opinion

LAVERY, C.J. The plaintiff, Rada Bidoae, appeals from the decision of the workers' compensation review board (board) affirming the determination by the workers' compensation commissioner (commissioner) that she was not entitled to benefits pursuant to General Statutes § 31-307. On appeal, the plaintiff maintains that the board improperly affirmed the commissioner's decision (1) to compel the plaintiff to undergo a vocational rehabilitation examination by a nonphysician and its subsequent decision to exclude evidence from her own vocational rehabilitation specialist, (2) that opinions by the Social Security Administration are not binding on the workers' compensation commission (commission) and (3) that the plaintiff had not sustained her burden of proving her total incapacity. We affirm the decision of the board.

On or about May 30, 1999, while working for the

defendant employer,[1] the Hartford Golf Club, the plaintiff sustained a compensable injury to her back. She initially was treated by the Connecticut MultiSpecialty Group, where she was diagnosed with an acute low back sprain and lumbar spondylosis. A magnetic resonance imaging procedure was performed on June 27, 1999, which revealed a small disc herniation. The plaintiff received follow-up care by Albert Casale, a physician, who placed the plaintiff out of work on June 22, 1999, but then released her to a light-sedentary duty work capacity on July 20, 1999. In the fall of 1999, Casale increased her work restrictions to encompass no excessive bending and a ten pound weight restriction. The plaintiff also received epidural injections at Saint Francis Hospital and Medical Center in Hartford.

The plaintiff was then treated by Dr. W. Jay Krompinger, a physician, who opined that the plaintiff had a light-sedentary duty work capacity, and she eventually was discharged after achieving maximum medical improvement. On August 8, 2000, Krompinger found that the plaintiff had an 8 percent permanent partial impairment to her back. He diagnosed her with central back pain secondary to a degeneration of her L5-L1 disc.

On September 18, 2000, the plaintiff underwent a vocational rehabilitation examination with hank Lerner, a nonphysician vocational rehabilitation specialist. The defendants requested that the plaintiff submit to their own vocational rehabilitation examination with David Suja, another nonphysician, but she refused. The defendants moved to compel the examination, and a formal hearing on

the issues was held before the commissioner. On July 24, 2001, the commissioner ordered the plaintiff to undergo the defendants' vocational examination. He further ordered that if the plaintiff refused to submit to the examination, she would precluded from entering evidence from her own vocational expert. The plaintiff appealed from that decision to the board, which affirmed the commissioner's decision. The plaintiff then appealed from the board's decision to this court, but we dismissed the appeal for lack of a final decision.

A formal hearing was held on April 2, 2003, regarding the plaintiff's claim of total incapacity. Testimony was heard and evidence was submitted, but Lerner's report was not admitted as a full exhibit pursuant to the July 24, 2001 order because the plaintiff never submitted to the defendants' vocational rehabilitation examination. One June 24, 2003, the commissioner found in favor of the defendants and dismissed the claim for total incapacity benefits. The plaintiff appealed from that decision to the board, which affirmed the commissioner's decision. This appeal followed.

The plaintiff's arguments rest on the proposition that the board improperly affirmed the decisions of the commissioner. We note that "[t]he review [board;s] hgearing of an appeal from the commissioner is not a de novo hearing of the facts....[I]t is oblig[ated] to hear the appeal on the record and not retry the facts. [T]he power and duty of determining the facts rests on the commissioner, the trier of facts....[T]he conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Rogers v. Laidlaw*

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Transit, Inc., 45 Conn. App. 204, 206, 695 A.2d 1071 (1997). "On appeal, the board must determine whether there is any evidence in the record to support the commissioner's findings and award." *Bryan v. Sheraton-Hartford Hotel*, 62 Conn. App. 733, 739, 774 A.2d 1009 (2001). We now turn to the plaintiff's arguments.

I

The plaintiff maintains that the board improperly affirmed the commissioner's decision to compel the plaintiff to undergo a vocational rehabilitation examination by a nonphysician and the commissioner's subsequent decision to exclude evidence from the plaintiff's own vocational rehabilitation expert because of her refusal to comply with the order. We disagree.

A

When the defendants attempted to compel the plaintiff to submit to an evaluation with their vocational rehabilitation expert, she refused, arguing that an independent medical examination with a nonphysician vocational rehabilitation specialist would be an invasion of her personal privacy as defined by General Statues § 52-178a.[2] She contends that because a nonphysician vocational rehabilitation specialist does not practice a healing arts under General Statutes § 20-1, [3] the commissioner cannot order such an examination. She argues that the commissioner cannot transcend his statutorily defined jurisdictional

boundaries; see *Dowling v. Slotnik*, 244 Conn. 781, 800, 712 A.2d 396, cert. Denied sub nom. *Slotnik v. Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998); and absent specific authorization by the Workers' Compensation Act; General Statutes § 31-275 et seq.; a commissioner cannot order a plaintiff to submit to an examination by a nonphysician, such as a vocational rehabilitation specialist. We disagree.

"Ordinarily, [an appellate] court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statu's purposes....[A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts....Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonable, arbitrarily, illegally or in abuse of its discretion....Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny....the agency is not entitled to special deference." (Citations omitted; internal quotation marks omitted.) *Burke v. Fleet National Bank*, 252 Conn. 1, 9-10, 742 A.2d 293 (1999). Whether General Statutes § 31-294f [4] precludes a commissioner from compelling a plaintiff to submit to vocational rehabilitation examination, conducted by a person who is not a physician, is a question that has not been previously subject to judicial consideration. As that novel issue presents to a question or law, our review is plenary. Although the plain language of § 31-294f authorizes physical or mental examinations "by a reputable practicing physician

or surgeon,"[5] and the defendants' vocational rehabilitation expert is not a medical doctor. § 31-278 provides in relevant part that the commissioner "shall....have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter...." The commissioner's abilities are further expanded by General Statues § 31-298, which provides in relevant part that "the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter...."

One of the fundamental purposes of the commissioner's expansive evidentiary reach is to encourage full disclosure and cooperation among t he parties the pendency of a claim. *Dixon v. United Illuminating Co.*, 1996 CRB-4-94-3 (August 4, 1995), aff'd, 57 Conn. App. 51, 748 A.2d 300 cert. Denied, 253 Conn. 908, 753 A.2d 940 (2000). "[A] commissioner must always protect the substantial rights

of parties [which] include the right of the employer....independently to examine the claimant, to notice his deposition, and to insist on hearing his personal testimony at a formal hearing....Protecting such substantial right is part and parcel of ensuring that each party in a compensation proceeding receives a fair hearing. Workers' compensation hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process....A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner....Each party has the right to produce relevant evidence and to offer *rebuttal* evidence." (Citations omitted.) *Bailey v. State*, 65 Conn. App. 592, 604, 783 A.2d 491 (2001). Thus, the specific directive concerning the procedure for obtaining mental or physical examinations by physicians contained in § 31-294f does not detract from a commissioner's authority to act pursuant to the more general provisions that may render such information discoverable.

Nonetheless, litigants are not without protection against unnecessarily onerous application of the discovery rules. As a general proposition, requiring the plaintiff to submit to extensive vocational assessment procedures might well be unduly burdensome.[6] Here, however, to establish her unemployability, the plaintiff retained a nonphysician vocational rehabilitation expert who was prepared to testify that examination and testing established the plaintiff's present lack of capacity to perform in the workforce. The plaintiff thereby overtly made vocational rehabilitation assessment procedures material and necessary for the defendants for the

purpose of rebuttal. The opportunity to present a competing assessment of the plaintiff's vocational abilities by a similarly qualified expert thus became imperative, given the goal underlying our discovery rules of ensuring that both the plaintiff and the defendant receive a fair trial. Under those circumstances, it cannot be said that the commissioner abused his discretion in finding that the need for the discovery outweighed the burden on the protesting party and, as a result, in compelling the discovery. Therefore, the board properly affirmed the decision of the commissioner.

B

The plaintiff also argues that the board improperly affirmed the commissioner's decision to exclude evidence from her own vocational rehabilitation specialist because of her refusal to comply with the order to submit to the defendants' examination. We disagree.

"Practice Book § [13-14][7] authorizes the trial court to grant a wide range of relief...for a party's failure to [submit to a physical or mental examination]. The determination of whether to enter sanctions pursuant to [Practice Book § [13-14] and, if so, what sanction or sanctions to impose, is a matter within the sound discretion of the trial court....In reviewing a claim that this discretion has been abused the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness....[T]he ultimate issue is whether the court could reasonable conclude as it did." (Citation omitted; internal quotation marks omitted.) *Amba*

Realty Corp v. Kochiss, 67 Conn. App. 149, 151-52, 786 A.2d 1137 (2001), cert. Denied, 259 Conn. 912, 789 A.2d 993 (2002).

Additionally, the commissioner has broader discretion over evidence than does a trial court. General Statutes § 31-298 provides in relevant part that "the commissioner shall proceed, so far as possible, in accordance with the rules of equity. *He shall not be bound by the ordinary common law of statutory rules of evidence or procedure*, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter...." (Emphasis added.) In accordance with the broad sanction power of Practice Book § 31-298 that the commissioner protect the substantial rights of the parties while exercising his broad, equitable powers to take evidence and to carry out the provisions of chapter 568 of the General Statues, we hold that the commissioner did not abuse his discretion in precluding the plaintiff from admitting evidence from her vocational rehabilitation expert when she disregarded the commissioner's order to submit to an examination by the defendants' expert. Thus, the board properly affirmed the decision of the commissioner.

II

The plaintiff next argues that the board was without jurisdiction to decide that she did not meet the requirements for total incapacity because the Social Security Administration has deemed her totally disabled from work for purposes of receiving of social security disability benefits. We disagree and conclude that a finding by the

Social Security Administration that the plaintiff is disabled for purposes of social security disability benefits does not preempt a workers' compensation commission from making its own independent determination concerning ability to work.

The claim in essence is a collateral estoppel, or issue preclusion argument. "[C]ollateral estoppel precludes a party of relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim." *Dowling v. Finley Associates, Inc.*, 248 Conn. 364, 373-74, 727 A.2d 1245 (1999).

"An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." (Emphasis in original; internal quotation marks omitted.) Id., 374. We have determined that the issue of total incapacity was not actually litigated. The standards of the Social Security Administration in adjudicating total disability are not the same standards used by our workers' compensation commission and, thus, a commissioner may decline to admit them into evidence. See *Krajewski v. Atlantic Aerospace Textron*, 15 Conn. Workers' Comp. Rev. Op. 44, 2120 CRB-6-94-8 (Nov. 28, 1995).[8]

Additionally, "[t]o assert successfully the doctrine of issue preclusion...a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case."

(Internal quotation marks omitted.) *Dowling v. Finley Associates, Inc.*, supra, 248 Conn. 374. We note that the defendants in this case were not parties to the Social Security Administration action and were not in privity with any of the parties. Se *Mazziotti v. Allstate Ins. Co.*, 240 Conn. 799, 813, 695 A.2d 1010 (1997) (collateral estoppel "requires an identity of issues between the prior and subsequent proceedings and operates only against the same parties or those in privity with them"). Additionally, any right to intervene in the social security action "does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation...." 47 Am. Jur. 2d 77, Judgements § 659 (1995); see also *Young v. Metropolitan Property & Casualty Ins. Co.*, 60 Conn. App. 107, 115, 758 A.2d 452 cert. denied, 255 Conn. 906, 762 A.2d 912 (2000). Therefore, the prior findings should not be given preclusive effect, and we hold that the findings of total disability by the Social Security Administration are not binding on the workers' compensation commission.

III

The plaintiff also contends that the board improperly affirmed the commissioner's decision that she had not sustained her burden of proving that she met the requirements for total incapacity benefits. We disagree.

"[T]he power and duty of determining the facts rests on the commissioner, the trier of facts....The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to subordinate facts or from them." (Citation omitted; internal quotation marks omitted.) *Dichello v. Holograth Corp.*, 49 Conn. App. 339, 352-53, 715 A.2d 765 (1998).

General Statutes § 31-307 (a) provides in relevant part that a plaintiff shall receive benefits "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work...." The plaintiff relies on *Osterlund v. State*, 135 Conn. 498, 66 A.2d 363 (1949), for the proposition that when a plaintiff is capable of working, but "his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find employer who will employ him, he is just as much totally incapacitated as though he could not work at all." Id., 506-507; see also *Hildvegi v. Nidec Corp.*, 3607 CRB-05-97-05 (June 15, 1998) (although plaintiff had light duty capacity, she was temporarily totally disabled because she was not capable of any degree of work and not employable on basis of physical restrictions, age, limited education, lack of transferable skills). The plaintiff here argues that her claim is such a case. We disagree.

The plaintiff is a fifty-four year old woman who emigrated to the United States in 1991. Her only job in the United States has been working as a housekeeper for the Hartford Golf Club. Although she attended college for four years and worked as a biology and chemistry teacher in Romania, her attempts to secure other work, including a teacher's aide position, have failed. Here, difficulty stems from the fact that while she is conversationally competent in English, she is not fluent and has been unable to pass a driver's license examination. In 2000, Krompinger opined that the plaintiff was capable of sedentary work only, but that she may be a candidate for social security disability benefits because of her educational background and functional capacity. Jay Cudrin, a psychologist, examined the plaintiff for the purpose of a social security disability determination and opined that the plaintiff was afflicted with

depressive disorder that may be secondary to her medical condition and that her IQ bordered on mental retardation, but that "there is no doubt that this score grossly underestimated her actual intelligence level. Her performance on this test was severely hampered by her problems with English and the fact that lived in another country until about ten years ago." He also stated that she had severe problems with consistent attention and concentration.

The plaintiff has not proven that she is eligible for § 31-307 benefits. Although she has proven that she has the ability to perform in a light duty capacity only, she has not shown that she has made adequate attempts to secure gainful employment or that she truly is unemployable.

The plaintiff also argues that she is suffering from a mental illness attributable to her accepted injury and, therefore, should be eligible for § 31-307 benefits. We disagree. Section 31-307 (c) (6) provides that "any injury resulting in incurable imbecility or mental illness" shall be considered as causing total incapacity. We agree with the defendants that although Cudrin stated the plaintiff's depressive disorder "*may* be secondary to her medical condition," the plaintiff has not met her burden of proving that the mental illness is causally related to her work-related injury or that any alleged mental illness is incurable.

We conclude that sufficient evidence existed to support the commissioner's determination that the plaintiff had not sustained her burden of proof in regard to her claim of total disability. Therefore, the board properly affirmed the findings of the commissioner on this claim.

The decision of the workers' compensation review

board is affirmed.

In this opinion the other judges concurred.

[1]The employer's workers' compensation insurance carrier is also a defendant in this action.

[2]General Statutes § 52-178a provides: "In any action to recover damages for personal injuries, the court or judge may order the plaintiff to submit to a physical examination by one or more physicians or surgeons. No party may be compelled to undergo a physical examination by any physician to whom he objects in writing submitted to the court or judge."

[3]General Statutes § 20-1 defines "healing arts" as "the practice of medicine, chiropractic, podiatry, naturopathy and, except as used in chapters 384a and 388, and sections 19a-16a to 19a-16c, inclusive, the practice of optometry."

[4]General Statutes § 31-294f (a) provides that "[a]n injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commission. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examination as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

[5]General Statutes § 31-278 (17) provides that the definition of a physician "includes any person licensed and authorized to practice a healing art, as defined in section 20-1, and licensed under the provisions of chapters 370, 372 and 373 to practice in this state."

[6]The plaintiff argues that allowing such examinations will allow the defendants to send the plaintiff to unqualified individuals. We disagree. In order to allow an expert opinion into evidence, the commissioner must determine that the witness is qualified to give such an opinion and that there is a factual basis for the opinion. See *State* v.

Asherman, 193 Conn. 695, 716, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050 S. Ct. 1749, 84 L. Ed. 2d 814 (1985).

[7]Practice Book § 13-14 provides in relevant part: (a) If any party...has failed to submit to a physical or mental examination...the judicial authority may, on motion, make such order as the ends of justice require.

"(b) Such orders may include the following:

"(1) The entry of a nonsuit or default against the party faility to comply;

"(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;

"(3) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(4) The entry of an order prohibiting the party who has failed to comply from introducing designating matters in evidence;

"(5) If the party failing to comply is the plaintiff, th entry of a judgement of dismissal..."

[8]The plaintiff contends that the holding in *Krajewski* is not applicable to this case because it reviewed benefits under General Statutes § 31-308a and not General Statutes § 31-307. We disagree. After reviewing both § 223 (d) (2) (A) of the Social Security Act; 42 U.S.C. § 423, as amended; relevant federal regulations and § 31-307, we conclude that the standards for determining total disability also are not

the same in those sections and that the holding in *Krajewski* is therefore applicable.

CASE NO. 4693 CRB-6-03-7
CLAIM NO. 601019458 :

COMPENSATION REVIEW BOARD

RADA BIDOAE V. HARTFORD GOLF CLUB

JUNE 23, 2004

APPEARANCES: The claimant was represented by Neil Johnson, Esq., AAAA Legal Services, 96 Webster Street, Hartford, CT 06114.

The respondents were represented by Dominick Statile, Esq., Montstream & May, P.O. Box 1087, 655 Winding Brook Drive, Glastonbury, CT 06033.

This Petition for Review from the June 24, 2003 Finding and Dismissal of the Commissioner acting for the Sixth District was heard January 23, 2004 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners A. Tomas White and Charles F. Senich.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, Rada Bidoae, has appealed from the June 24, 2003

Finding and Dismissal of the Commissioner acting for the Sixth District. We affirm the decision of the trial commissioner.

The pertinent facts are as follows. The claimant was employed as a housekeeper with the respondent, Hartford Golf Club since 1991. On May 30, 1999 the claimant injured her back while in the course of her employment. After her initial treatment with Connecticut Multi Specialty Group she was diagnosed with an acute low back strain with lumbar spondylosis. The claimant was temporarily totally disabled from June 1, 1999 through June 9, 1999. Thereafter, Ms. Bidoae was released to light duty capacity by St. Francis Care. On June 27, 1999 the claimant underwent an MRI of the lumbar sacral spine which revealed a small disc herniation at T12-L1 and L1-L2 and moderate spondylosis at L1-L2. The respondents noted Ms. Bidoae had a pre-existing back injury in 1997. She was also involved in a motor vehicle accident on February 21, 1998 and sustained injuries to her back and neck as a result. X-rays taken of the claimant's lumbar and cervical spine at that time revealed a narrow L5-S1 interspace and a narrow C5-C6 disc space and subluxation at C5.

At a formal hearing held on July 24, 2001 a trial commissioner ordered if the claimant did not submit to the respondent's vocational examination within a reasonable time period at the formal hearing she would be precluded from producing any evidence relevant to her own vocational expert's assessment. That trial commissioner's order was the subject of a prior appeal, *Bidoae v. Hartford Golf Club*, 4424 CRB-6-01-8 (June 27, 2002). In that appeal, the claimant primarily contended that a vocational rehabilitation specialist falls outside the scope of § 31-294f C.G.S. This statue

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allows the employer or commissioner to request the employee undergo an examination by a practicing physician or surgeon in order to determine the nature of the worker's injury and related incapacity. While we agreed with the claimant that § 31-294f was inapplicable to the determination
of this issue we held "a trier is acting well within his authority if he rules that she [the claimant] cannot offer such evidence without giving her employer and its workers' compensation insurer an opportunity to offer relevant rebuttal evidence by scheduling their own vocational rehabilitation examination." Id. Therefore, we upheld the trial commissioner's determination that the claimant be precluded from offering her own vocational expert's evidence if she did not submit to the respondent's vocational expert's examination. To date the claimant has not submitted to such.

The claimant raises the same issue regarding the rehabilitation expert in this appeal as she did in her prior appeal. This issue was the subject of an earlier appeal and for that reason we will not address the issue a second time. *Matey v. Dember*, 3153 CRB-5-95-8 (January 10, 1987), *aff'd in part and rev'd in part*, 256 Conn. 456 (2001); *Cuascut and VMMC v. Waldbaum's Foodmart*, 16 Conn. Workers' Comp. Rev. Op. 3, 3111 CRB-8-96-6 (October 1, 1996). Therefore, the findings regarding the admissibility of the claimant's vocational expert's evidence shall stand.

On June 22, 1999 Dr. Albert Casale, an orthopedic surgeon, placed the claimant out of work. On July 6, 1999, upon the claimant's request, Dr. Casale placed the claimant out of work for two additional weeks but told the claimant she would need to return to work after that period passed. On July 20, 1999 Dr. Casale placed the claimant on a light

duty sedentary work capacity.

On December 23, 1999 the claimant was seen by Dr. Jay Krompinger, an orthopedic surgeon, who opined that claimant had a sedentary work capacity. Dr. Krompinger diagnosed the claimant with central back pain secondary to a degeneration of an L5-S1 disc and treated her with physical therapy, epidural injections and a brace. On August 8, 2000 Dr. Krompinger assigned the claimant an eight percent permanent partial disability to her lumbar spine. The trial commissioner who heard the merits of the claim found the claimant had not sustained her burden of proof that she was permanently and totally disabled as a result of her May 30, 1999 work-related injury. He therefore dismissed the claim.

The claimant has appealed this finding. The thrust of the claimant's remaining issues on appeal concern the commissioner's alleged error in failing to find the claimant was totally disabled pursuant to § 31-307 C.G.S.[1] The claimant in her brief alleges the combination of the following factors would mandate a finding of total disability, citing

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[1]The claimant raised several additional issues in her Brief which were not raised in her Reasons for Appeal. Specifically, the claimant alleges the respondent benefitted from an illegal and improper communication with the claimant's treating physician. Additionally, the claimant contends the trial commission erred in failing to award interest and attorney's fees under § 31-300 C.G.S. As these issues were not raised in a timely fashion, they are not discussed in this opinion. Furthermore, there was no testimony or evidence submitted regarding any alleged illegal communications at the formal hearing. Additionally, we note an award of interest under § 31-300 is assessed at the discretion of the trial commissioner. *Delcarmine v. Fire Prevention Service, Inc.*, 5 Conn. Workers' Comp. Rev. Op. 123, 311 CRD-7-84 (June 27, 1988). As this opinion affirms the trial commissioner's decision to deny total disability benefits to the claimant, we would logically support a finding that does not include interest and attorneys fees.

Osterlund v. State, 135 Conn. 498 (1949). The claimant is a 54-year-old, 1991 Russian immigrant. She is not fluent in English. Ms. Bidoae has only worked in the United States as a housekeeper for the respondent-employer. She has been unsuccessful at obtaining a teacher's aid position. The claimant has not been able to pass a driver's license examination. Due to her language barrier, she has been unable to find other jobs. In May 2000 Dr. Krompinger opined that the claimant was only capable of sedentary work, but due to her educational background and functional capacity she may be a candidate for Social Security Disability. Jay Cudrin, PhD examined the claimant for the purpose of a Social Security Disability determination. Claimant's Exhibit A, July 15, 2002 report. Dr. Curdin opined the claimant was afflicted with depressive disorder that may be secondary to her medical condition and that I.Q. bordered on mental retardation. He stated that she had severe problems with consistent attention and concentration.

The claimant has the burden of proving she is eligible for § 31-307 benefits. *Cummings v. Twin Tool Mfg.*, 40 Conn. App. 36, 42 (1996); *LaPierre v. UTC/Pratt & Whitney*, 4305 CRB-8-00-10 (October 23, 2001). The trial commissioner must decide whether a claimant has met that burden as a factual matter and possesses the sole authority to determine which of the medical, documentary or testimonial evidence is reliable or unreliable. *Duddy v. Filene's (May Department Stores Co.)*, 4484 CRB-7-02-1 (October 23, 2002; *Pallott v. Blakeslee Prestress, Inc.*, 3651 CRB-3-97-7 (July 17, 1998). If there is evidence in the record to support the inferences drawn by the trier of fact, we cannot disturb those findings on review. *Phaiah v. Danielson Curtain (C.C. Industries)*, 4409 CRB-2-01-6 (June 7, 2002).

In *Osterlund*, supra, 506-507, the court stated that if an employee is able to perform some gainful employment, however, "his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all." The claimant argues because of her physical incapacity combined with her lack of skills and failed attempts to find employment, she should be deemed totally disabled. We disagree. There was ample evidence to support the trier's finding that the claimant was not totally disabled.

An independent medical examination was performed by Dr. Peter R. Barnett. Dr. Barnett found the claimant was "capable of sedentary and ambulatory work avoiding any activities which place bending, lifting, twisting or prolonged unrelieved standing stresses on the lower back." Respondent's Exhibit 6. The claimant testified that she attended college for four years in her native country, Romania. April 2, 2003 Transcript, p. 33. The claimant testified that she worked as a Biology and Chemistry teacher in Romania. Id., pp. 21, 23. She testified that she attended Community Technical College in Hartford. Id., p. 23. Although the claimant vaguely testified that she applied for some positions and was unable to obtain those jobs, Id. p. 22, there was no comprehensive testimony nor other evidence submitted regarding the claimant's unsuccessful job search.

Dr. Cudrin stated the claimant was "conversationally competent in English." He opined the claimant's remarks to him "suggested that although she had physical limitations, she was able to handle many activities of daily living and routine repetitive tasks." Claimant's Exhibit A. Although Dr. Cudrin found the claimant's IQ test scored bordering mental retardation he stated, "there is no doubt that this score

grossly underestimated her actual intelligence level. Her performance on this test was severely hampered by her problems with English and the fact that she lived in another country until about 10 years ago." *Id.*

Furthermore, Dr. Cudrin's examination was based on a determination for Social Security Disability benefits. Similarly, Dr. Krompinger opined the claimant may be a candidate for Social Security Disability. However, we have repeatedly held that decisions regarding Social Security Disability are not material to Workers' Compensations claims insofar as the standards used by the Social Security Administration differ from those used by the Workers' Compensation Commission. *Bailey v. Stripling Auto Sales, Inc. d/b/a Willimantic Dodge/Nissan*, 15 Conn. Workers' Comp. Rev. Op. 369, 3095 CRB-2-95-6 (June 28, 1996); *Krajewski v. Atlantic Aerospace Textron*, 15 Conn. Workers' Comp. Rev. Op. 44, 2120 CRB-6-94-8 (November 28, 1995). For these reasons we believe the trial commission had ample evidence to support his findings and we will not overturn those findings on review.

Therefore, we affirm the June 24, 2003 Finding and Dismissal of the Commissioner acting for the Sixth District.

Commissioners A. Thomas White and Charles F. Senich concur.

RADA BIDAOE : STATE OF CONNECTICUT
6 Goshen Street
Hartford, CT 06106
CLAIMANT : WORKERS'
: COMPENSATION
: COMMISSION

VS.

HARTFORD GOLF CLUB : SIXTH DISTRICT
134 Norwood Road
West Hartford, CT 06117
EMPLOYER : FILE #601019458

ESUS
P.O. Box 5001
Hartford, CT 06102
INSURER : JUNE 24, 2003

APPEARANCES:

The claimant was represented by Atty. Neil Johnson c/o AAAA Legal Services, 96 Webster Street, Hartford, CT 06114.

The respondents were represented by Atty. Dominick Statile c/o Montstream & May, P.O. Box 1087, 655 Winding Brook Dr., Glastonbury, CT 06033.

FINDING AND DISMISSAL

Pursuant to statutory notice to all parties, a formal hearing was held before the undersigned Commissioner at the Sixth District, New Britain, Connecticut on April 2, 2003. On June 17, 2003, the record was closed upon the

filing of Proposed findings and Briefs.

BASED UPON THE EVIDENCE PRESENTED, THE FOLLOWING FACTS ARE FOUND:

1. The claimant, Rada Bidaoe, had been employed with the Hartford Golf Club as a housekeeper since 1991.

2. The claimant's job duties were to clean the woman's locker room by cleaning up trash and cleaning the sinks and showers.

3. On May 30, 1999, the claimant injured her back while in the employ of the respondent Hartford Golf Club, picking up a box of paper while cleaning the woman's locker room. (Claimant's Ex. A)

4. The claimant first received treatment at the Connecticut Multi Specialty Group where she was diagnosed with an acute low back strain with lumbar spondylosis. (Claimant's Ex. A)

5. The claimant was temporarily totally disabled from Jun 1, 1999 through June 9, 1999. At that time she was released to light duty capacity by St. Francis Care with lifting up to 20 pounds and bending, stooping, climbing up to 10 minutes at a time. (Claimant's Ex. A)

6. On June 27, 1999, the claimant underwent an MRI of the lumbar sacral spine which revealed a small disc herniation at T12-L1 and L10L2

and moderate spondylosis at L1-L2 and moderate spondylosis at L1-L2. (Claimant's Ex. A)

7. The claimant was then seen by Dr. Albert Casale an orthopedic surgeon. On June 22, 1999, Dr. Casale placed the claimant out of work. (Claimant's Ex. A)

8. On July 6, 1999, the claimant returned to Dr. Casale and requested an additional two weeks out of work. Dr. Casale placed the claimant out of work for two more weeks but told the claimant she would have to return to work after the two weeks elapsed. (Claimant's Ex. A)

9. On July 20, 1999, the claimant returned to Dr. Casale who placed her on a light duty sedentary work capacity. Dr. Casale increased the claimants work activities in the fall of 1999. (Claimant's Ex. A)

10. The claimant was seen by Dr. Jay Krompinger an orthopedic surgeon on December 23, 1999 at which time he opined that the claimant had the capability of a sedentary work capacity. (Claimant's Ex. A)

11. At no time was the claimant ever released or placed out of work due to her May 39, 1999 work related injury. (Claimant's Ex. A)

12. Dr. Krompinger diagnosed the claimant with

central back pain secondary to a degeneration of an L50S1 disc with treatment consisting of physical therapy, epidural injections and a brace. (Claimant's Ex. A)

13. A formal hearing was held before Commissioner Stephen Delaney and on July 24, 2001 Commissioner Delaney issued a Finding and Order concerning vocational examination. (Respondent's Ex. 2)

14. In said Finding Commissioner Delaney ordered the claimant to submit to the respondent's vocational examination within a reasonable time period or the claimant would be precluded from producing any evidence relevant to her own vocational expert's assessment at the formal hearing. (Respondent's Ex. 2)

15. The claimant has to date refused to submit to a respondent's vocational examination.

16. On August 8, 2000, Dr. Jay Krompinger assigned the claimant an eight percent (8%) permanent partial disability to her lumbar spine. (Claimant's Ex. A)

17. The claimant had a pre-existing back injury in 1997 and was treated by Dr. Paradis for said injury. (Claimant's Ex. A)

18. The claimant was also involved in a motor vehicle accident of February 21, 1998 and sustained injuries to her neck and back as a

result of said motor vehicle accident.

19. X-rays of the claimant's lumbar and cervical spine revealed a narrow L5-S1 interspace and a narrow C5-C6 disc space and a subluxation at C5. (Respondent's Ex. 4)

20. The claimant was also treated at the Nutmeg Pain Center subsequent to her February 21, 1998 motor vehicle accident. (Respondent's Ex. 3)

21. It is the claimant's contention that based upon the opinion of her treating physician she is permanently and totally disabled employed.

ISSUE:

Has the claimant sustained her burden of proof that she is permanently and totally disabled as a result of her May 30, 1999 work related injury?

BASED ON THE FOREGOING, IT IS HEREBY FOUND, ADJUDGED AND ORDERED:

A. The claimant has not sustained or met her burden of proof that she is permanently and totally disabled as a result of her May 30, 1999 work related injury.

B. The claimant did not present any evidence concerning her work capacity from a vocational rehabilitation specialist/expert.

C. The claimant refused to submit to the respondent's vocational examination and therefore the claimant was

precluded at the time of this formal hearing from producing any evidence relevant to her own vocational expert's assessment at the formal hearing.

D. I find that the claimant's claim for permanent total benefits is Dismissed.

E. In all other respects, this file shall remain open, subject to further hearings at the request of the parties or the Commissioner.

IT IS SO FOUND, CONCLUDED AND ORDERED.

BY THE COURT,

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ASSISTANT CLERK-APPELLATE

RADA BIDOAE : STATE OF CONNECTICUT
6Goshen Street
Hartford, CT 06106
CLAIMANT : WORKERS' COMPENSATION
: COMMISSION

VS.

HARTFORD GOLF
CLUB : SIXTH DISTRICT
134 Norwood Road
West Hartford, CT 06117
EMPLOYER : FILE #601019458

MASTERCARE
P.O. Box 805
Wallingford, CT 06492
INSURER : JULY 24, 2001

APPEARANCES:

The claimant was represented by Atty. Neil Johnson c/o AAAA Legal Services, 96 Webster Street, Hartford, CT 06114.

The insurer was represented by Atty. Dominick Statile c/o Montstream & May, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

FINDING AND ORDER RE: VOCATIONAL EXAMINATION

Pursuant to statutory notice to all parties, a formal hearing was held before the undersigned on May 8, 2001. The following facts are found:

1. The claimant, Rada Bidoac, (hereinafter referred to as the claimant) sustained an eight percent (8%) permanent partial disability to her back on May 8, 1999 which arose out of and in the course of her employment with the respondent/employer, the Hartford Golf Club (hereinafter referred to as the respondent).

2. The claimant's treating physician, Dr. W. Jay Krompinger, opined in his report of May 4, 2000, "I suspect she is a candidate for social security".

3. The claimant sought an evaluation on the issue of her work capacity from a vocational rehabilitation specialist/expert, Mr. Hank Lerner. An employability assessment report was issued on September 18, 2000.

4. It is the claimants contention based upon the assessment and opinions of her vocational rehabilitation expert, she is permanently and totally disabled from employment.

5. The claimant seeks to support this claim by introducing into evidence at a formal hearing the testimony/report of Mr. Lerner, her vocational expert.

6. The respondents attempted to schedule the claimant for an evaluation with their vocational rehabilitation expert, Mr. David Saja.

7. The claimant has refused to submit to this evaluation.

8. The claimant objects to an independent examination

with a vocational rehabilitation specialist who is not a physician or surgeon by definition in accordance with Connecticut General Statute Section 31-294f.

9. The claimant further contends that an independent medical examination by a vocational rehabilitation specialist would be an invasion of a persons personal privacy as defined by Connecticut General Statute Section 52-178a. Connecticut General Statute Section 31-294f states in pertinent part,

"An injured employee shall submit himself to examination by a reputable practicing physician or surgeon at any time while claiming or receiving compensation, upon reasonable request of the employer or at the direction of the Commissioner."

10. A physician as defined by Connecticut General Statue Section 31-275(17) includes any person licensed and authorized to practice a healing art as defined in Connecticut General Statute Section 20-1. The claimant further contends a vocational rehabilitation specialist is not authorized to practice a healing art and therefore would not be covered under Connecticut General Statute Sections 31-294f, 31-275 and 20-1.

11. It is the respondent's contention that the claimant must submit to their vocational examination to be performed by Mr. Saja or be precluded from entering from her own expert on the employability issue.

12. In support of their position, the respondents contend that the Workers' Compensation Commissioner derives its power and authority from its enabling

statutes. Pursuant to Connecticut General Statute Section 31-278, each Commissioner is empowered with extensive authority in determining how to preside over a claim.

13. The respondents further contend that the powers of the Commissioner are further expanded as set forth in Connecticut General Statute Section 31-298 which states in pertinent part,

"the Commissioner shall proceed so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence of procedure, but shall make inquiry though oral testimony, deposition testimony or written records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."

14. The evidentiary power of the Commissioner has been stated to be even greater than the evidentiary reach of the Superior Court. *Powers v. Hotel Bond Co.* 89 Conn. 143, 148-149 91915) and *Costelli v. Blakeslee Arpaia Chapman*, 2159 CRB-3-94-9 (1/11/96)

15. One of the fundamental purposes of the Commissioner's expansive evidentiary reach is to encourage full disclosure and cooperation among the parties during the pendency of a claim. *Dixon v. United Illuminating Co.* 1996 CRB-4-94-3 (8/4/95)

16. The respondents further contend that pursuant to Connecticut Reg. 31-283a-2, the Commissioner, claimant, respondent or any other interested party, may request a claimant undergo vocational

rehabilitation services, if eligible. An integral part of this program is the performance of a vocational evaluation.

17. The respondents further contend that by analogy, that while there is no statute which requires an individual to undergo an examination other than a physical examination, the Practice Book has reviewed an interpreted Connecticut General Statute Section 52-178a to include physical and mental examinations.

18. Practice Book Section 13-11(a) provides in pertinent part,

"In any civil action, where the judicial authority finds it reasonable probable that evidence outside the record will be required, in which the mental or physical condition of a party—is material to the prosecution or defense of said action, the judicial authority may order the party to submit to a physical or mental examination by a physician".

19. Based upon the above statutes and relevant Practice Book citations, the respondent contends that when a party puts his/her physical or mental condition in dispute they are required to undergo an examination with a doctor of the opposing parties choosing.

20. Lastly, the respondents assert in the event the claimant refuses to submit to such an examination after an order, relevant case law and the Federal Rules of Civil Procedure should be followed and the claimant should be prohibited from introducing his/her expert evidence on the issue.

21. Based upon the above, the claimant asserts that a strict construction of Connecticut General Statutes 31-294f and those limitations articulated by our courts as well as a claimed right to privacy support the position that she should not be required to undergo a vocational examination as requested by the respondent.

22. Based upon the above, the respondent asserts the Commissioner has the broad powers and authority to order a vocational examination and as such, an order should enter to achieve equity, fair play, full disclosure and cooperation between the parties. Failure to comply with such an order should result in the claimants preclusion to submit her vocational evidence on the issue of employability.

WHEREFORE, UPON ALL THE EVIDENCE BEFORE ME, I AM SATISFIED, CONCLUDE AND FIND THAT:

A. The claimant, Rada Bidoae, sustained an eight percent (8%) permanent partial disability to her back on May 8, 1999 which arose out of an in the course of her employment with the respondent/employer, Hartford Golf Club.

B. The claimant's treating physician, Dr. W. Jay Krompinger, opined in his report of May 4, 2000, "I suspect she is a candidate for social security".

C. The claimant sought an evaluation on the issue of her work capacity from a vocational rehabilitation specialist/expert, Mr. Hank Lerner. An employability assessment report was issued on September 18, 2000.

D. It is the claimants contention that based upon the assessment and opinions of her vocational rehabilitation expert, she is permanently and totally disabled from employment as a result of her injuries.

E. The claimant seeks to support this claim by introducing into evidence at a formal hearing the testimony/report of Mr. Lerner, her vocational expert.

F. The respondents attempted to schedule the claimant for an evaluation with their vocational rehabilitation expert, Mr. David Saja.

G. The claimant has refused to submit to this evaluation.

H. The claimant objections to an independent medical examination with a vocational rehabilitation specialist who is not a physician or surgeon by definition in accordance with Connecticut General Statute Section 31-294f.

I. The claimant has put her vocational total disability claim at issue in this matter.

J. No evidence of any physical/mental impairments was introduced which inhibit or prohibit the claimant from undergoing such an examination.

K. Administrative notice is taken that a vocational examination is not a traditional physical examination. A majority of vocational rehabilitation experts are not physicians. Medical records are reviewed and other testing is performed.

L. A duty to adhere to the strict construction of applicable statutes and those limitations articulated by the courts must be balanced against the concepts of equity, fair play, full disclosure and cooperation.

M. I find and conclude the consideration and protection of the substantive rights of the respondent outweigh the claimants assertions of strict statutory construction, limitations and a claimed right to privacy.

N. Resolving these threshold issues, I find and conclude that Connecticut General Statute Section 31-278 and Section 31-298 as well as pertinent case law, vest in this Commissioner the power and authority to order the claimant to undergo the respondents vocational examination.

O. Applicable case law and the Connecticut Practice Book provide guidance and direction for fashioning a remedy in the event of a parties refusal to comply with such an order to undergo the examination. I find, conclude and adopt this remedy.

WHEREFORE, IT IS ORDERED, AWARDED, ADJUDGED AND DECREED THAT:

1. The claimant is ordered to submit to the respondent's vocational rehabilitation examination within a reasonable time period or she will be precluded from producing any evidence relative to her vocational experts assessment or report at the formal hearing.

Stephen B. Delaney
Commissioner-Sixth District

CASE NO. 4424 CRB-6-01-8 :COMPENSATION REVIEW
CLAIM NO. 601019458 :BOARD

RADA BIDOAE
CLAIMANT-APPELLANT :WORKERS'
:COMPENSATION
:COMMISSION

v. :JUNE 27, 2002

HARTFORD GOLF CLUB
EMPLOYER

and

MASTERCARE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Neil Johnson, Esq., AAAA Legal Services, 96 Webster Street, Hartford, CT 06114.

The respondents were represented by Jean Malloy, Esq., Montstream & May, L.L.P., Salmon Brook Corporate Park, 655 Winding Brook Drive, Glastonbury, CT 06033-6087.

This Petition for Review from the July 24, 2001 Finding and Order of the Commission acting for the Sixth District was heard February 22, 2002

before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Donald H. Doyle, Jr. and Amado J. Vargas.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the July 24, 2001 Finding and Order of the Commissioner acting for the Sixth District. She contends on appeal that the trier erred by ordering that the admission of certain evidence be conditioned upon her acceding to an examination by a vocational rehabilitation specialist who was not also a physician within the meaning of § 31-294f C.G.S. We find no error, and affirm the trial commissioner's decision.

The trial commissioner found that the claimant sustained and 8% permanent partial disability to her back following a May 8, 1999 injury that arose out of and in the course of her employment with the respondent Hartford Golf Club. Her treating physician stated on May 4, 2000 his suspicion that she he had become a candidate for social security. The claimant sought a work capacity evaluation from Hank Lerner, a vocational rehabilitation specialist, who issued an employability assessment report on September 18, 2000. Based on his assessment, she contends that she is permanently and totally disabled from all employment. At the formal hearing, she sought to support her claim by introducing Lerner's testimony.

The respondents then attempted to schedule her for an evaluation with David Saja, another vocational rehabilitation expert. The claimant refused to submit to that

evaluation, arguing that an independent medical examination with such a specialist would be an invasion of her personal privacy as defined by § 52-178a C.G.S.[1] Because a vocational rehabilitation specialist does not practice a healing art under § 20-1 C.G.S.[2], she asserts that § 31-294f and § 31-275 do not permit an order for such an exam. The respondents, meanwhile, argued that the commissioner's evidence-gathering powers encompass such an order. They also argued that Admin. Reg. § 31-238a-2[3] allows any party to request that a claimant undergo vocational rehabilitation

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[1]Section 52-178a provides, "In any action to recover damages for personal injuries, the court or judge may order the plaintiff to submit to a physical examination by one or more physicians or surgeons. No party may be compelled to undergo a physical examination by any physician to whom he objects in writing submitted to the court or judge."

[2]Section 20-1 defines "healing arts" as "the practice of medicine, chiropractic, podiatry, naturopathy and, except as used in chapters 384a and 388 the practice of optometry."

[3]Administrative Reg. § 31-283-2 states, "As provided in Section 31-283a of the general statutes, a disabled employee may be eligible for vocational rehabilitation benefits, provided the Chairman or his designee finds that:

> (1) The employee, employer, insurance carrier, physician, Commissioner, or other interested party has requested vocational rehabilitation services by completing and filing an application signed by the applicant for vocational rehabilitation benefits with the Chairman or his designee.
> (2) There exists a permanent impairment which substantially disables the employee for a significant period of time from performing the worker's most recent or customary type of work and that such permanent impairment is a direct result of any injury found to be compensable under Chapter 568 of the general statutes by a Commissioner, voluntary agreement, an award; or in lieu of those, a stipulation approved by a Commissioner."

services, if eligible, which presupposes that a claimant be asked to submit to a vocational evaluation. The trier agreed with the respondents' position. He held that the relevant statutes, together with the Practice Book[4] and concepts of equity, fair play, full disclosure and cooperation, allow a respondent to seek an examination with a vocational rehabilitation expert if a claimant wishes to offer her own evidence of like kind. The trier therefore ordered that she either submit to the examination, or be precluded from offering her own vocational rehabilitation expert's report into evidence. The claimant has appealed from that ruling.

The main thrust of the argument in the claimant's brief is that a vocational rehabilitation specialist falls outside the scope of § 31-294f, which allows the employer or the commissioner to request that an injured employer submit himself "to examination by a reputable practicing physician or surgeon," in order to determine the nature of the injury and resultant incapacity. "Physician," in turn, is defined by § 31-275(17) as any person authorized and licensed to practice a healing art, as defined by § 20-1. She takes the position that, absent specific authorization by the Workers' Compensation Act, a trial commissioner cannot invoke the general provisions of § 31-278 C.G.S. and § 31-298 C.G.S. to order a claimant to submit to an examination by a non-physician such as a vocational rehabilitation specialist. She

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[4]Specifically, the trial commissioner cited P.B. § 13-11(a) which states, "In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonable probable that evidence outside the record will be required, in which the mental or physical condition of a party, or of a personal in the custody of or under the legal control of a party, is material to the prosecution or defense of said action, the judicial authority may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in party's custody or legal control."

then cites a number of cases that stress the proposition that the remedial purpose of the Act cannot transcend its statutorily-defined jurisdictional boundaries. See, e.g., *Dowling v. Slotnick*, 244 Conn. 781, 800 (1998). In her view, the trial commissioner lacked the authority to rule that he would exclude her vocational rehabilitation expert's testimony and reports unless she consented to an examination by a vocational rehabilitation specialist of the respondent's choosing. Indeed, at oral argument, the claimant's counsel went so far as to say that the Act intends to give the claimant an advantage by creating evidentiary restrictions for employers and insurers that do not equally constrain injured employees who are seeking benefits.

With respect to this line of reasoning, the only mutual perspective we share with the claimant is our agreement with her point that § 31-294f does not apply in this instance. Given that she seeks to introduce testimony by her own vocational rehabilitation expert in support of her permanent total disability claim, we do not see the respondent's request for an examination by a similar expert as being primarily grounded in the rights granted to employers by § 31-294f. Rather, the respondents' requests strikes a chord that is more basic to the principals of due process: the notion that one is entitled to confront a witness on equal terms, by addressing any relevant issue that has been placed into dispute by a party seeking some sort of recovery. The respondents raised in their brig the case of *Cook v. Miller*, 103 Conn. 267 (1925), A Supreme Court opinion which held that a defendant in a civil negligence suit was entitled to obtain a physical examination of the plaintiff, whose injuries were the basis of the pending claim. Though that case may have dealt with a doctor's examination, the underlying principle was quite clear: it would be a gross violation of justice for a plaintiff to be able to introduce expert testimony on an issue

related to her physical or mental condition without permitting the defense to introduce expert testimony of a like kind.

As noted in the recent case of Bailey v. State, 65 Conn. App. 592 (2001), § 31-298 C.G.S. grants broad authority to a commissioner to carry out the provisions of the Workers' Compensation Act. The statute states the trier "shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, *in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter*." (Emphasis added). In doing so, he must endeavor to protect the parties' substantial rights, which include the right of the employer to examine the claimant independently, to notice his deposition, and to insist on hearing his personal testimony at a formal hearing. *Bailey*, supra, 604, citing *Pietraroia v. Northeast Utilities*, 254 Conn. 60, 71-72 (2000). The fundamental right of a party to be heard at a meaningful time and in a meaningful manner includes the right to produce relevant evidence and to offer rebuttal evidence. Bailey, supra; *Bryan v. Sheraton-Hartford Hotel*, 62 Conn. App. 733, 740 (2001).

Where a claimant seeks to claim entitlement to total disability benefits by offering the testimony and reports of a vocational rehabilitation specialist, a trier is acting well within his authority if he rules that she cannot offer such evidence without giving her employer and its workers' compensation insurer an opportunity to offer relevant rebuttal evidence by scheduling their own vocational rehabilitation examination. Such a ruling is clearly designed to protect the rights of all parties by creating a level playing

field. We strongly reject the insinuation of the claimant's counsel that this system is designed to give the claimants the advantage of being able to offer certain types of evidence that may not be made under such circumstances, and § 31-294f would not preclude such an examination. As the trier noted, the Practice Book also supports such a ruling, and the respondents would in any case be entitled to apply for vocational rehabilitation services for the claimant pursuant to § 31-283s. These factors all support the decision below.

The trial commissioner's decision is accordingly affirmed.

Commissioners Donald H. Doyle, Jr. and Amado J. Vargas concur.

APPELLATE COURT

STATE OF CONNECTICUT

NO. A.C. 23245

RADA BIDOAE

V.

HARTFORD GOLF CLUB ET AL.

September 11, 2002

ORDER

AFTER HEARING AS TO WHY THE APPEAL SHOULD NOT BE DISMISSED FOR LACK OF A FINAL JUDGEMENT, IT IS HEREBY ORDERED THAT THE APPEAL IS DISMISSED.

NOTICE SENT: September 11, 2002
AAAA LEGAL SERVICES
MONTSTREAM & MAY
CRDCD01 0004424
TOPAC

C.G.S.A. § 31-307

Connecticut General Statutes Annotated Currentness
Title 31. Labor
Chapter 568. Workers' Compensation Act (Refs & Annos)
Part B. Workers' Compensation (Refs & Annos)
§ 31-307. Compensation for total incapacity

a) If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity.

1. (b) Notwithstanding the provisions of subsection (a) of this section, any employee who suffers any injury or illness caused by his employer's violation of any health or safety regulation adopted pursuant to chapter 571 or adopted by the federal Occupational

Safety and Health Administration and listed in 29 CFR, Chapter XVII, after the violation has been cited in accordance with the provisions of section 31-375 or the provisions of the Occupational Safety and Health Act of 1970, 84 Stat. 1601 (1970), 29 USC 658 and not abated within the time fixed by the citation, provided the citation has not been set aside by appeal to the appropriate agency or court having jurisdiction, shall receive a weekly compensation equal to one hundred per cent of the employee's average weekly earnings at the time of the injury or illness.

(c) The following injuries of any person shall be considered as causing total incapacity and compensation shall be paid accordingly: (1) Total and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision; (2) the loss of both feet at or above the ankle; (3) the loss of both hands at or above the wrist; (4) the loss of one foot at or above the ankle and one hand at or above the wrist; (5) any injury resulting in permanent and complete paralysis of the legs or arms or of one leg and one arm; (6) any injury resulting in incurable imbecility or mental illness.

(d) An employee who has suffered the loss or loss of the use of one of the members of his body, or part of one of the members of his body, or the reduction of vision in one eye to one-tenth or less of normal vision, shall not receive compensation for the later injury in excess of the compensation allowed for the injury when considered by itself and not in conjunction with the previous incapacity except as provided in this chapter.

(e) Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an

employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits.

C.G.S.A. §31-276

Connecticut General Statutes Annotated Currentness

Title 31. Labor

Chapter 568. Workers' Compensation Act (Refs & Annos)

Part A. Workers' Compensation Commission. Compensation Commissioners. Employer's Liability (Refs & Annos)

I. Workers' Compensation Commission. Compensation Commissioners. (Refs & Annos)

§31-276. Workers' Compensation Commission. Compensation commissioners. Nomination by Governor. Appointment by General Assembly. Terms of office. Removal. Selection of a chairman

(a) There shall be a Workers' Compensation Commission to administer the workers' compensation system. There shall be sixteen workers' compensation commissioners. On or before the date of the expiration of the term of each commissioner or upon the occurrence of a vacancy in the office of any commissioner for any reason, the Governor shall nominate a competent person to fill that office. Subsequent to July 1, 1993, each person nominated by the Governor to serve as a commissioner shall have been a member in good standing of the Connecticut bar for at least five years preceding the nomination, provided the Governor shall not be precluded from renominating an individual who has previously served as a commissioner. The commissioners shall, upon nomination by the Governor, be appointed by the General Assembly as prescribed by law. They shall serve for a term of five years, but may be removed by impeachment. The Governor shall from time to time select one of the sixteen commissioners to serve as chairman of the Workers' Compensation Commission at the pleasure of the Governor. The commissioner selected by the Governor to be chairman shall have previously served

as a compensation commissioner in this state for at least one year.

1. (b) Notwithstanding the provisions of subsection (a), on and after October 1, 1988, any commissioner whose term expires on December thirty-first shall continue to serve until the next succeeding March thirty-first.

(c) Each nomination made by the Governor to the General Assembly for a compensation commissioner shall be referred, without debate, to the committee on the judiciary, which shall report thereon within thirty legislative days from the time of reference, but no later than seven legislative days before the adjourning of the General Assembly. Each appointment by the General Assembly of a compensation commissioner shall be by concurrent resolution. The action on the passage of each such resolution in the House and in the Senate shall be by vote taken on the electrical roll-call device. No resolution shall contain the name of more than one nominee. The Governor shall, within five days after he has notice that any nomination for a compensation commissioner made by him has failed to be approved by the affirmative concurrent action of both houses of the General Assembly, make another nomination to such office.

(d) Notwithstanding the provisions of section 4-19, no vacancy in the position of a compensation commissioner shall be filled by the Governor when the General Assembly is not in session unless, prior to such filling, the Governor submits the name of the proposed vacancy appointee to the committee on the judiciary. Within ten days, the committee on the judiciary may, upon the call of either chairman, hold a special meeting for the purpose of approving or disapproving such

proposed vacancy appointee by majority vote. Failure of the committee to act on such proposed vacancy appointee within such ten-day period shall be deemed to be an approval.

(e) Each commissioner shall be sworn to a faithful performance of his duties. After notice and public hearing the Governor may remove any commissioner for cause and the good of the public service. Each compensation commissioner shall devote his full time to the duties of his office and shall not be otherwise gainfully employed.

AMER
RECORDS
AND
BRIEFS

No. 05-1110

Supreme Court, U.S.
FILED
MAR 3 0 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RADA BIDOAE,

Petitioner,

v.

HARTFORD GOLF CLUB ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Connecticut

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner in this matter was asserting that she was at permanent total disability status and therefore unable to return to work. In order to establish this claim the Petitioner underwent a Vocational Examination with her own vocational expert. Arguably, it was her expert's opinion that the claimant may be totally disabled from gainful employment. The Respondents wanted to have the claimant submit to their own Vocational Examination with an expert of their choosing in an attempt to defend the claim, but the Petitioner refused. This issue went to a Formal Hearing in front of a Trial Commissioner on May 8, 2001, and the Commissioner issued an Order dated July 24, 2001 ordering the Petitioner to undergo a Respondents' Vocational Examination. The Commissioner further ordered that if the claimant refused to undergo said examination, then the claimant was precluded from entering her vocational expert's report into evidence. The Petitioner appealed this Order to the Compensation Review Board and in a decision dated June 27, 2002, the Compensation Review Board affirmed the Trial Commisioner's Order. *Bidoae v. Hartford Golf Club*, 4424 CRB-6-01-8 (June 27, 2002).

The Petitioner then appealed to the Appellate Court of the State of Connecticut. The Appellate Court utilized both Connecticut and Federal Statutes to affirm the Trial Commissioner and the Compensation Review Board. *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470 (2005). The Petitioner then requested certiorari to the Connecticut Supreme Court. *Bidoae v. Hartford Golf Club*, 276 Conn. 921 (2005). Certiorari was denied by the Connecticut

Supreme Court, thus leading to the Petitioner's current appeal to the United States Supreme Court.

REASONS FOR DENYING THE PETITION

The decision of the Connecticut Appellate Court does not conflict with any federal statutes, nor does it decide an important question of federal law in conflict with the United States Supreme Court. In addition, in her petition for writ of certiorari to the United States Supreme Court, the petitioner asserts incorrect statements of both fact and of law on a number of occasions. Certiorari has already been denied by the Connecticut Supreme Court, and for these reasons, the Respondents believe that Certiorari should be denied by the United States Supreme Court. The arguments set forth hereafter in support of this assertion are organized to mirror the outline established in the Petitioner's Petition for Writ of Certiorari.

I. THE DECISION OF THE CONNECTICUT APPELLATE COURT WAS A CORRECT INTERPRETATION OF BOTH CONNECTICUT AND FEDERAL LAW, AND CLEARLY DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

This section of the petitioner's brief clearly misstates the ruling of the Connecticut Appellate Court. The petitioner provides, as relevant:

> In the case at bar, the Connecticut Appellate Court held that a Workers' Compensation Commissioner can order a claimant to undergo an examination, physical or mental, by a non-physician

> in exercise of his equitable powers and that these equitable powers usurp the statutes enacted by the legislature governing these examinations.

This was not the holding of the Connecticut Appellate Court. Rather, what the Appellate Court did find was that in this case, in order to establish her inability to sustain gainful employment, the plaintiff retained a non-physician vocational rehabilitation expert who was prepared to testify that, "examination and testing established the plaintiff's present lack of capacity to perform in the workplace." The Appellate Court found that the plaintiff, "thereby overtly made vocational rehabilitation assessment procedures material and necessary for the defendants for the purpose of rebuttal." *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 478 (2005). Thus, the Appellate Court properly held that the opportunity to present a competing assessment of the plaintiff's vocational abilities by a similarly qualified expert was imperative in order to ensure that both sides received a fair trial. Therefore, the Appellate Court affirmed the Trial Commissioner's holding, and determined that the need for discovery outweighed the burden on the plaintiff, and, therefore, compelled discovery. There was no holding, as asserted by the Petitioner, that a Commissioner can order, "an examination, *physical or mental*, by a non-physician." (emphasis added).

The Petitioner, in her brief in Section I of the Reasons for Granting the Writ, further stated regarding the Appellate Court's decision:

> The Connecticut Appellate Court further held that due process of the Untied (sic) States Constitution and the Connecticut Constitution does not include a right to privacy in relation

with examinations of parties to a litigation and that if it did exist that the Workers Compensation Commissions equitable powers usurp this Constitutional right.

This is a blatant misstatement of the Connecticut Appellate Court's decision in this case. Simple reading of the plain language of the decision makes this abundantly clear. The Petitioner clearly must not be allowed to devise a fictional holding of the Appellate Court so as to create a federal question to be reviewed by the United States Supreme Court.

A. THE APPELLATE COURT DID NOT VIOLATE THE SEPARATION OF POWERS CLAUSE, AND DID NOT ORDER A MEDICAL EXAMINATION BY A NON-PHYSICIAN

The Petitioner in Section IA of her argument asserted that the Connecticut Appellate Court, in its decision, compelled a claimant to undergo a physical examination by a non-physician, therefore, "transcending specifically delineated powers instead of enforcing them." Further, the Petitioner argued that, "The Appellate Court modified and changed the Statute and legislatures (sic) directive to include examinations by a non-physician whether requested by the employer or ordered by the commissioner."

This argument is void of merit. It lacks a correct factual basis, and is an inaccurate application of both Connecticut and Federal statutes. First and foremost, the Respondents have *never* asked that the claimant be required to submit herself to a "physical" examination by a vocational rehabilitation specialist. Secondarily, but of no less importance, the Appellate Court decision does not

hold that the claimant must submit herself to a "physical" examination by a vocational rehabilitation specialist retained by the respondents.

What the Respondents requested, and what the Appellate Court affirmed, was the necessity for the claimant, under the facts of this case, to submit herself to a "vocational" assessment by a vocational rehabilitation specialist. There is no "physical" component to such an assessment, as a vocational rehabilitation specialist never physically examines a client. Instead, a vocational rehabilitation specialist reviews a client's medical records, conducts an oral interview of a client, and administers vocational testing designed to assist in developing a client's vocational profile. Such testing may include an IQ test, and any other of a number of general standardized, written, and oral vocational tests such as the Test of Non-Verbal Intelligence-3 (TONI-3), Wide Range Achievement Test-3 (WRAT-3), General Clerical Test (GCT), Wechsler Memory Scale-III (WMS-III), and the Wechsler Adult Intelligence Test-III (WAIS-III). A vocational expert's assessment also takes into account a client's work history and transferable job skills, and may additionally address a labor market survey in order to determine job availability in a particular geographic area. None of this, involves the "physical" examination of a client by a "non-physician" vocational expert.

The Respondents have not asked for such a physical invasion of the sanctity of the claimant's body; the Trial Commissioner and the Compensation Review Board did not grant the appellees the right to any such invasion; and, the Appellate Court did not affirm any such invasion. A vocational examination is not a "physical" examination,

as asserted by the appellant, and her claims to the contrary are misguided. The Appellate Court's decision, therefore, clearly does not violate the claimant's right to privacy as alleged by the Petitioner. The Petitioner has opened the door to the issue of whether she is vocationally unemployable, and the Respondents must be given the opportunity to rebut that assertion.

Furthermore, the Petitioner asserts that, "The Appellate Court by upholding this ruling surpassed its power to review, acted outside of its powers to review and interpret law, delved into the powers and stepped into the shoes of the legislative branch." This argument is flawed and can be easily disposed. The Appellate Court at no time ordered a physical examination. The Appellate Court merely affirmed the ruling of the Compensation Review Board, which determined that the Petitioner should not be afforded the opportunity, on one hand, to present her evidence and witnesses, yet, on the other hand, refuse to cooperate with the Respondents, thus obstructing their own opportunity to do the same. The Petitioner subjected herself to a vocational assessment by a specialist of her choosing. The Respondents were simply looking for the same opportunity. To deny this opportunity for the Respondents to meaningfully develop their case would be contrary to due process.

Furthermore, in this matter, the Appellate Court did not create legislation or usurp the powers of the Legislative Branch. The Connecticut Appellate Court merely reviewed the holding of the Trial Commissioner and the Compensation Review Board, and determined that it was decided in a correct manner at the lower administrative and trial levels.

B. THE APPELLATE COURT DID NOT VIOLATE THE SEPARATION OF POWERS BY EXCLUDING TESTIMONY

In the Petitioner's argument she cites to Connecticut General Statutes Section 31-294f which states, as relevant:

> An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the request of the employer or at the direction of the commissioner .... The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal.

Again, the Respondents reiterate, that the examination which was sought was not a medical examination. Rather, it was a vocational assessment. Therefore, this section is not applicable.

This issue was solely an evidentiary matter, and, pursuant to the Workers' Compensation Act of the State of Connecticut, is therefore left to the ultimate discretion of the Trial Commissioner. Thus, the Appellate Court correctly applied the guidelines established in Connecticut General Statutes Section 31-298, which provides in relevant part:

> The commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to

> ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter . . .

Furthermore, as stated by the Appellate Court on page 479 of their decision, "the commissioner has broader discretion over evidence than does a trial court." [See *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 479 (2005)] Thus, when making their ruling, the Appellate Court relied upon the Connecticut Workers' Compensation Act, and subsequently determined, "that the commissioner did not abuse his discretion in precluding the plaintiff from admitting evidence from her vocational rehabilitation expert when she disregarded the commissioner's order to submit to an examination by the defendants' expert." *Id.*

Again, this argument of the Petioner does not raise a legitimate federal question. The Connecticut Appellate Court was not legislating, nor was it changing the Workers' Compensation Act in any manner. Rather, it was utilizing the Act and its mandates when reviewing and affirming the decision of the Trial Commissioner.

C. THE APPELLANT'S FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE RULING OF THE CONNECTICUT APPELLATE COURT

As to the Appellate Court's affirmation of the Trial Commissioner's order that the petitioner needed to either submit to the respondents' vocational examination or be barred from submitting her own vocational expert report, that determination was based upon the respondents' basic fundamental rights of "due process." The rationale for same is laid out in a clear and succinct fashion by the

Appellate Court at pages 477 to 478 of the decision. [See *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470 (2005)]. The Appellate Court affirmed the Trial Commissioner's finding that, "the need for the discovery [the vocational evaluation] outweighed the burden on the protesting party. . . . " *Id.*, p. 478. On this issue, the petitioner's arguments are akin to a plaintiff in a product liability case who has exclusive control over the claimed defective product, who seeks to submit into evidence an expert opinion on the alleged defective nature of the product, while seeking to bar the defendants from having their own expert examine the product. Where is the due process in such an argument? It does not exist.

The Petitioner, in this section of her Petition for Writ of Certiorari, relies upon flawed legal arguments, as well as misstatements of fact, in order to develop her due process argument. First, the Petitioner asserted that the, "Appellate Court legislated from the bench in ruling that a medical examination, physical or mental, can be ordered by the Workers' Compensation Commission in direct violation of Statute." She continued on to state:

> By the Appellate Court failing to implement and follow the statutory guidelines for this type of examination, applying sanctions outside of the legislative directive, punishing the Petitioner for objecting to a physical/mental examination by a non-physician as defined by statute and denying the petitioner the right to a fair hearing violated (sic) the Petitioners Due Process Rights.

This assertion is a repetitive and incorrect argument. Again, the Appellate Court did not legislate from the bench, they affirmed the Trial Commissioner's and the Compensation Review Board's utilization of relevant

portions of both Connecticut state law and Federal law. Furthermore, the Appellate Court did not create or apply sanctions outside the realm of the Workers' Compensation Act of the State of Connecticut, nor was a physical examination by a non-physician ordered. Again, these are repetitive and flawed arguments that misstate the Appellate Court's decision in this matter, and skew the facts in a manner that would favor the Petitioner.

The Petitioner also argues, "The employer in the matter at hand had every legal right to request and have ordered an examination by a qualified physician/surgeon to contest the Petitioners evidence but chose not to do so." This is a misstatement of fact. The Petitioner had an examination conducted by a vocational rehabilitation specialist. This examination was not a medical or physical examination. As a result of this meeting with the Rehabilitation specialist, the Petitioner was prepared to have this individual testify that she was not capable of employment from a vocational, not medical standpoint. The Respondents merely sought to present equal evidence from their own vocational rehabilitation specialist. At no time did the Respondents seek a physical examination. The Petitioner's assertion that the Respondents could have obtained such an assessment flies in the face of reason. Physicians are *not* vocational experts.

II. THE DIFFERENT STANDARDS ESTABLISHED BY THE SOCIAL SECURITY ADMINISTRATION AND THE WORKERS' COMPENSATION ACT OF THE STATE OF CONNECTICUT DO NOT CONFLICT NOR DO THEY HAVE A DETERMINATIVE EFFECT ON ONE ANOTHER

The final issue raised by the appellant in her Petition is a claim that the Social Security Determination should

have bearing on the Workers' Compensation Commission's finding of no total disability. Again, the Appellate Court, quite clearly and concisely, addressed this concern at pp. 480-481 of their decision. The standards for Social Security Disability are different than the standards for Connecticut Workers' Compensation, and the Respondents were not parties to the Social Security Disability action. *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 480-481 (2005). As such, the Petioner's claims for collateral estoppel or issue preclusion on this issue are misguided and should be given no further attention. Furthermore, this issue was not previously raised by the Petitioner at the time of trial and therefore has not been appropriately preserved for appeal.

CONCLUSION

For all the foregoing reasons, the Respondents respectfully request that the Petitioner's Petition for Certiorari be denied.

Respectfully submitted,

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FILED
APR 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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In the Supreme Court of the United States

RADA BIDOAE,

Petitioner

v.

HARTFORD GOLF CLUB ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE DECISION OF THE CONNECTICUT APPELLATE COURT WAS AN INCORRECT INTERPRETATION OF BOTH CONNECTICUT AND FEDERAL LAW, AND VIOLATES THE UNITED STATES CONSTITUTION

The Respondent in this matter has brought into issue the holdings in the Appellate Court. In specific, the Respondent has stated that the petitioner has blatantly misstated the Appellate Courts decision on several occasions.

The Appellate Court in its decision stated;

> When the defendants attempted to compel the plaintiff to submit to an evaluation with their vocational rehabilitation expert, she refused, arguing that the independent medical examination with a nonphysician vocational rehabilitation specialist would be an invasion of her personal privacy as defined by General Statutes §52-178a. She contends that because a nonphysician vocational rehabilitation specialist does not practice a healing art under General Statutes §20-1 the commissioner cannot order such an examination. She argues that the commissioner cannot transcend its statutorily defined jurisdictional boundaries; see *Dowling v. Slotnik*, 224 Conn. 781, 800, 712 A.2d 396 cert. Denied sum nom. *Sotnic v. Consindine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L.Ed.2d 451 (1998); and absent specific authorization by the Workers Compensation Act; General Statutes §31-275 et seq.; a commissioner cannot order a plaintiff to submit to an examination by a nonphysician such as a vocational rehabilitation specialist. We disagree.

The court then goes on to reason in support of its disagreement that;

"Although the plain language of §31-294f authorizes physical or mental examinations by a reputable practicing physician or surgeon, and the defendants' vocational rehabilitation expert is not medical doctor, §31-294f does not limit the equitable powers of the commissioner."

The court further in support of its disagreement that;

> General Statutes §31-178 provides in relevant part that the commissioner shall. . . have the power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provision of this chapter. . . .

The court also in support of this disagreement stated that;

> The commissioner's abilities are further expanded by General Statutes 31-298, which provides in relevant part that the commissioner shall proceed, so far as possible, in accordance with the

> rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. . .

The court thereafter went into a short due process discussion, which was discussed in the Petitioner's original petition, and ultimately concluded that;

"Thus, the specific directive concerning the procedure for obtaining mental or physical examination by physicians contained in §31-294f does not detract from a commissioner's authority to act pursuant to the more general provisions that may render such information discoverable."

The Petitioner's statement as to the Courts Holding was not and is not a blatant misstatement of the Appellate Courts Rulings. The Appellate Court has used the legislatures grant of powers, the powers of equity to conduct hearings and the powers of equity regarding the rules of evidence, to supercede the Connecticut Legislatures statutory directives regarding Examinations and/or to create new law governing these types of examinations.

A. THE APPELLATE COURT VIOLATED THE SEPARATION OF POWERS CLAUSE AND DID ORDER A MEDICAL EXAMINATION BY A NON-PHYSICIAN

1. AN EXAMINATION BY A VOCATIONAL REHABILITATION SPECIALIST IS A PHYSICAL AND/OR MENTAL EXAMINATION

The respondents argue that the Workers Compensation Commission did not order an Medical Examination by a non-physician which the Appellate Court further upheld. The Respondents argument is superfluous and should not be an overriding issue to defeat the Claimants Petition. A vocational rehabilitation specialist evaluates a persons physical and mental condition to determine a persons employability. Courts, State and Federal alike, have determined that any order from any court for an examination by a Vocational Rehabilitation Specialist is in fact a physical and/or mental examination. See *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990); *In re Mitchell,(*563 F.2d 143 5th Cir.1977); *Landry v. Green Bay & Western Railroad Co.*, 121 F.R.D. 400 (E.D. Wis. 1988); *Soudelier v. Tug Nan Services, Inc.*, 116 F.R.D. 429 (E.D.La. 1987); *Acocella v. Montauk Oil Transportation Corp.*, 614 F. Supp. 1437 (S.D.N.Y. 1985). See also *Williams v. Smith*, 576 So.2d 448 (1991); *State ex rel., Kerns v. Cain*, 8 S.W. 3d 212 (1999); *Avila v. Superior Court, In and For County of Maricopa 816* P.2d 946 (1991) and most recently in Connecticut see *Gladney v. Riccio* 2006 WL 574256 (Conn. Super. 2006).

2. ALLOWANCE OF AN EXAMINATION BY A NON-PHYSICIAN VIOLATES THE PETITIONER'S RIGHT TO PRIVACY

The United States Supreme Court has held that a court cannot order examinations of parties absent Statutory Authority. *Union Pacific Ry. Co. v. Botsford*, 114 U.S. 250 (1891). The reasoning behind the rule that Statutory Authority must be present for examinations of parties is that it is the duty of the Legislature "to restrict the circumstances under which a party may be required to submit his mind or body for examination, thus balancing considerations of the sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth." *Williams v. Smith* supra.

The Connecticut Legislature by enacting Connecticut General Statutes §31-294f has Statutorily created provisions which restrict the circumstances in which a party may be required to submit to an examination and has clearly delineated that one of the circumstances must be that the examination take place by a licenced physician as defined by Connecticut General Statutes §20-1.

The Workers Compensation Commission by delving into its equitable powers to conduct discovery and hearings and ordering the Petitioner to undergo an examination by a non-physician stepped into the shoes of the Legislature, took upon itself to "balance the considerations of the sanctity of the body and the right to privacy with the considerations of fairness. ." and violated the Petitioner's Right to Privacy as set out in the United States Constitution, the Connecticut Constitution and the Legislative dictates set out in Connecticut Statutory Authority. *Id.*

3. WHETHER OR NOT THE CLAIMANT "OPENED THE DOOR" IS IRRELEVANT, THE STATE OF CONNECTICUT DOES NOT REQUIRE A SHOWING OF GOOD CAUSE TO NECESSITATE SUCH AN EXAMINATION AND DENYING THE RESPONDENT THE RIGHT TO HAVE THE PETITIONER UNDERGO AN EXAMINATION BY A NON-PHYSICIAN IS NOT CONTRARY TO DUE PROCESS.

Connecticut General Statutes Section 31-294f is clear as to its requirements in ordering an examination of a party and does not take into consideration a showing that a party put the issue into controversy or as the Respondents have stated opened the door to the issue nor does it require a showing of good cause. While Federal Rules of Civil Procedure 35 has delineated that the physical and/or mental condition must be in Controversy and there must be a showing of good cause, Connecticut General Statutes 31-294f does not mirror Rule 35 nor did the Courts in this matter look to rule 35 in making its decision.

Even if the courts in this matter had looked to rule 35 in making their determination it is clear that while the issue may be in controversy a showing of good cause for an examination by a vocational rehabilitation specialist would not have been met. Federal Courts have continuously rejected showings of good cause for an examination by a vocational rehabilitation specialist and determined that if a party desires his own vocational expert then the respondents have other discovery procedures available to obtain the same information. See *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990); *In re Mitchell*, 563 F.2d 143 (5th Cir.1977); *Soudelier v. Tug Nan Services, Inc.*, 116 F.R.D. 429 (E.D.La.

1987); *Acocella v. Montauk Oil Transportation Corp.*, 614 F. Supp. 1437 (S.D.N.Y. 1985).

The Respondents have the same opportunity to obtain more general discovery in Connecticut as under the Federal Rules of Civil Procedure and to submit that information to their own vocational rehabilitation specialist for an opinion and rebuttal testimony at trial. The Respondents argument that this opportunity does not exist and/or is insufficient is again superfluous and should not be used to override the Petitioner's request for review. Lastly, the Workers Compensation Commission did not request that the Respondents show good cause.

4. THE APPELLATE COURT AS THE REVIEWING COURT, UPHELD A RULING WHICH IS A RULING FROM THE BENCH

The respondents contest that the Connecticut Courts surpassed its powers and delved into the powers and stepped into the shoes of the Legislature in ordering a claimant to undergo an examination by a non-physician. Federal and State Courts alike have ruled and determined that an examination not directly authorized cannot be indirectly compelled by more general discovery rules and that doing such is stepping into the role of the Legislature. See *Acosta* supra.

II. THE FEDERAL SOCIAL SECURITY ACT AND THE WORKERS' COMPENSATION ACT OF THE STATE OF CONNECTICUT ARE IN CONFLICT AND THIS ISSUE HAS BEEN PROPERLY PRESERVED

The Petitioner argued before the Workers Compensation Commission and the Connecticut Appellate

Court that if the Social Security Administration determines that a party is disabled from injuries which arouse from an incident which is also subject of State Workers Compensation Laws then the Social Security Administrations determination of disability has a binding affect on the Workers Compensation Commissions determination of disability for the same injuries.

The Appellate Court ruled that a "determination by the Social Security Administration that the plaintiff is disabled for the purposes of social security disability benefits does not preempt a workers' compensation commission from making its own independent determination concerning ability to work." The Appellate Court applied the doctrine of Collateral Estoppel/Issue Preclusion in making its decision and ignored the Petitioner's argument of a Conflict between Federal Law and State Common Law.

The law regarding preemption, specifically conflict preemption, has long been in place and is clear under the Supremacy Clause.

> A court will find that an agency intends for a regulation to preempt a state law when a regulation conflicts with a state law. . . this so-called conflict preemption, which is a kind of implied preemption occurs when it is impossible for a private party to comply with both state and federal law, and when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of the relevant agency. . .

Wuebker v. Wilbur-Ellis Co. 418 F.3d 883 (2005) *internal quotations omitted citing Geier v. American Honda Motor Co.* 529 U.S. 861 at 884 and 873 (2000).

This theory of conflict preemption is applicable to the issues and facts of this matter. In specific, a party is injured on the job and makes a claim for State Workers Compensation Benefits. That person, due to the same exact injury, also makes a claim for Social Security Disability benefits. The Social Security Administration applying Federal Regulations in determining disability determines that party is disabled do to that injury and qualifies for benefits. The State Workers Compensation Commission, on the other hand, determines that the party is not disabled. According to the State Workers Compensation Commission, that party must seek employment. According to the Social Security Administration if that party seeks employment he/she no longer qualifies for Disability benefits. It is impossible for that party, the Petitioner in this case, to comply with both Federal and State Law, State Law now stands as an obstacle to the accomplishment and execution of the full purpose and objectives of the Social Security Administration.

The Petitioner has argued from the Workers Compensation Commission through the Connecticut Appellate Court this precise issue, the conflict of laws. While the Connecticut Courts have used other theories to defeat the Petitioner's claim/argument, the issue has still been preserved and should be heard.

CONCLUSION

For the reasons as set out in the Petitioner's Petition for Writ of Certiorari and the reasons set out in this Response the Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully Submitted

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Not Reported in A.2d, 2006 WL 574256 (Conn.Super.)

Superior Court of Connecticut,
Judicial District of Hartford.
Aleck GLADNEY
v.
John J. RICCIO, Jr. et al.
No. CV044004997S.
Feb. 24, 2006.

O'Connell Flaherty & Attmore, Hartford, for Aleck Gladney.
Rosenbaum & Vollono Law Offices, Glastonbury, for Costello Industries Inc.
Howard Kohn Sprague & Fitzgerald, Hartford, for John J. Riccio, Jr., American Materials Corporation.

KELLER, J.

*1 The motion to compel the plaintiff to submit to an examination by the defendants' vocational rehabilitation expert, who is not a physician, is denied. The statute, General Statutes § 52-178a, and the Practice Book rule, Section 13-11, limit the court's discretion. There is no broader grant of authority by statute or at common law that would permit this court to expand the rule permitting independent evaluations by physicians to other kinds of experts. The court concludes it cannot derive authority for an examination of the plaintiff by a non-physician from *Bidoae v. Hartford Golf Club*, 91 Conn.App. 470, 881 A.2d 418 (2005), as that case narrowly focuses on broader equitable powers specifically granted to workers' compensation commissioners under the general provisions of General Statutes § 31-298. As noted in *Bidoae*, "··· [T]he commission has broader discretion over evidence than does a trial court." *Id.*, at 479, 881 A.2d 418.

Nothing in this ruling should be construed to prevent the defendants from seeking appropriate discovery relative to Dr. Cohen's proposed expert testimony and/or disclosing their own vocational rehabilitation expert prior to trial.[1]

Conn.Super.,2006.
Gladney v. Riccio
Not Reported in A.2d, 2006 WL 574256 (Conn.Super.)

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[1]Plaintiff agreed at oral argument that it would be appropriate, for example, to allow defendants' vocational rehabilitation expert to review plaintiff's testing data and test results if they are part of the basis of plaintiff's expert's opinion.